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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 843

WABASH RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN R. HAYES,
Defendant in Error.

WRIT OF ERROR TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT.

BRIEF FOR PLAINTIFF IN ERROR IN OPPOSITION TO MOTION TO DISMISS.

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I.

THE COURTS OF ILLINOIS HAVE DENIED TO THE PLAINTIFF IN ERROR A RIGHT AND IMMUNITY CONFERRED BY THE FEDERAL EMPLOYERS' LIABILITY ACT. THE DENIAL OF THAT RIGHT BY THE STATE COURTS RAISES A FEDERAL QUESTION OF WHICH THIS COURT HAS JURISDICTION.

Defendant in error, in his brief in support of the motion to dismiss the writ of error, has challenged the jurisdiction of this Court on two distinct grounds. He con-

tends, first, that assuming that a Federal question is involved, the right here relied upon by the plaintiff in error was not "especially set up or claimed" in apt time in the courts of Illinois, and that the question, being raised now for the first time, is presented too late; and, secondly, his contention is that the claim of the plaintiff in error herein does not involve a Federal question at all.

In our argument we shall reverse the order in which defendant in error—to whom, for convenience, we shall refer as plaintiff—presented the two questions just suggested, and shall point out first precisely what is the Federal question upon which the plaintiff in error (to whom we shall refer as defendant) predicates its contention that this Court has jurisdiction to entertain the writ of error, and then shall show that the Federal right or immunity was urged and denied both in the trial court and in the Appellate Court of Illinois.

The order just outlined seems to us to be the order in which logically the two questions involved must be considered, since it is apparent that in order that the Court may consider advantageously the question whether the Federal right was claimed in the State courts, it must first of course, have clearly in mind what that question is.

The defendant in the trial court, and in the Appellate Court of Illinois, insisted that the Federal Employers' Liability Act created a new cause of action in favor of such employes of interstate carriers as shall be injured while engaged in interstate commerce; that in so far as the field covered by the Act was concerned, the Act wholly superseded the common law, and terminated the theretofore existing common law liability; that, therefore, a declaration alleging facts sufficient to constitute a cause of action under the Federal Employers' Liability

Act not only does not state a common law cause of action but affirmatively denies the existence of a common law liability for the injuries alleged.

The trial court, however, refused to accept defendant's construction of the Federal Employers' Liability Act, and held, on the contrary, that the Act did not destroy or affect the common law liability. The trial court's construction of the statute was acquiesced in by the Appellate Court of Illinois, which held that the rights conferred by the Federal Employers' Liability Act were "cumulative and not in abrogation of a right of action at common law"; that therefore a declaration alleging that the plaintiff, an employe of an interstate commerce carrier, was injured while engaged in interstate commerce not only stated a cause of action under the Federal statute, but also, notwithstanding the statute, continued to state a cause of action at common law; and that under such a declaration recovery could be had on the common law liability, without proof of the allegations that the injuries were sustained in interstate commerce, those allegations being treated—so far as the common law cause of action is concerned—as surplusage.

We are free to admit—at least for the purposes of this argument—that if the Appellate Court's construction of the Federal Employers' Liability Act were the correct construction; if it were possible, since the enactment of that Act, for the same state of facts to constitute a cause of action under the statute and also a common law cause of action; in a word, if the Federal Employers' Liability Act left unimpaired the common law liability, previously existing, for injuries whether interstate or intrastate—then the conclusion of the Appellate Court that the allegation in the declaration that the injuries were sustained in interstate commerce may be treated

as surplusage doubtless is correct—or at most is a question of pleading with which this Court has no concern. But if the construction placed upon the Employers' Liability Act by the Appellate Court is not correct; that is, if there is no longer a common law cause of action for the injuries covered by the Federal statute, then, of course, the allegation respecting interstate commerce cannot be regarded as in any sense surplusage. If the common law liability, which extended to injuries sustained both in interstate and intrastate commerce, remains unchanged by the Federal statute, then in proving a common law cause of action it is *immaterial* in which sort of commerce the injuries were received, and so of course an allegation that the injuries were received in interstate commerce is wholly immaterial and need not be proved. Nor, if it were proved, would that proof either aid or defeat the recovery. Such an allegation, therefore, would be surplusage.

But if the statute supersedes, *pro tanto,* the common law, an allegation that the injuries were sustained in interstate commerce would not be *immaterial.* Proof of such an allegation would not be unnecessary, merely, in an action based on the liability imposed by the common law upon the master for injuries to the servant; it would be absolutely fatal to such an action. Such an allegation, then, aids in the statement of a different cause of action, a cause of action which cannot co-exist with the common law cause of action.

It is too plain for serious argument, as we shall point out hereinafter, that the theory upon which recovery as for a common law liability was allowed—and the only theory upon which such recovery *could* be allowed—was that the remedies conferred by the Federal Employers' Liability Act are cumulative merely and not in abrogation

of the common law. So construing the Federal statute, the State court overruled the defendant's contention that the statute afforded a complete defense to a common law cause of action for injuries sustained in interstate commerce. Thus a right—an immunity from prosecution for a common law liability abrogated by the Federal statute—was denied. This, we submit, is clearly a Federal question, since the ruling of the State court in denying the immunity claimed was predicated clearly and exclusively upon a construction, which the plaintiff in error insists is erroneous, of the Federal statute upon which the claimed immunity was based.

We are not concerned at the present time with the correctness of the construction placed by the Appellate Court of Illinois upon the Federal Employers' Liability Act. We say merely at this time that we interpret the cases recently decided by this Court as holding unmistakably that as to the field covered by the Federal Employers' Liability Act the common law is superseded and the statutory cause of action is exclusive.

But it is immaterial, for the purposes of the present argument, which construction of the statute—the one urged by defendant, or the one adopted by the State court—is correct. It is sufficient to sustain the jurisdiction of this Court that the State court declined to construe the Federal statute in accordance with the contention of the plaintiff in error, when, so construed, the statute would have afforded a complete defense to the action.

We shall now discuss as briefly as possible the proceedings below which disclose the materiality of a proper construction of the Federal Employers' Liability Act.

In each of the four counts in plaintiff's declaration it is affirmatively alleged that both the plaintiff Hayes

and the defendant Railroad Company were engaged in interstate commerce at the time of the accident. (Rec., 5, 11, 15, 18.) Plaintiff concedes that each of the counts of the declaration is sufficient, in its averment that the injuries were sustained while both plaintiff and defendant were engaged in interstate commerce, to state a cause of action under the Federal Employers' Liability Act.

The trial court held as a matter of law that the allegation that the parties were engaged in interstate commerce was not proved, and that therefore there could be no recovery under the Federal Empoyers' Liability Act or the Federal Safety Appliance Act. Accordingly, since the interstate commerce allegations had not been proved, the defendant made a motion for a directed verdict in its favor. This motion was overruled, and the case was submitted to the jury on the theory that the plaintiff had alleged, and offered evidence tending to prove, a common law cause of action.

It is undisputed that the declaration alleged that the parties were engaged in interstate commerce; and, that being true, it is our contention that the Federal Employers' Liability Act, superseding as it did the common law as to injuries sustained in interstate commerce, confers the plaintiff's *only* right to recover for the injuries complained of, *and also affords a complete defense to a common law action for those injuries.* In other words, the declaration in this case, however sufficient it may have been before the enactment of the Federal Employers' Liability Act, cannot be held now to state a cause of action other than the statutory cause of action, if the construction of the statute for which we contend is correct. Consequently, the refusal of the State courts to construe the Federal statute as affording a defense to a common

law action for the injuries alleged in the declaration deprived the defendant of a right, privilege and immunity conferred by the laws of the United States, and so, of course, raises a Federal question.

That the sole controversy in this case is as to the effect of the Federal Employers' Liability Act on the common law liability is clearly apparent both from defendant's argument and the opinion of the Appellate Court of Illinois; and it is equally clear that the conclusion reached by the Appellate Court of Illinois was reached and justified solely on the theory that the Federal Employers' Liability Act did not abrogate existing common law causes of action, but conferred remedies which were merely cumulative.

Counsel's entire argument, it will be noted, proceeds from the premise, which we have contended is erroneous, *that the declaration in this case states a common law cause of action.* Thus at page 21 of the defendant's brief it is said:

> "It is conceded by plaintiff that under the allegations of the declaration in this case, a cause of action under the Federal Liability Law was sufficiently pleaded to warrant a recovery; *but we also claim that a common law cause of action was set up as well, sufficient to warrant a recovery thereunder.*"

It is with the contention in italics that we take issue; we say that the declaration *does not* state a common law cause of action. Clearly the divergent views result from different conceptions of the Federal Employers' Liability Act. For the purposes of this argument it may be conceded that prior to the enactment of the Federal Employers' Liability Act the declaration here involved stated a common law cause of action; the allegations that the parties were engaged in interstate commerce were immaterial, and therefore surplusage, *because the com-*

mon law right of action extended as well to injuries received in intrastate commerce as those received in interstate commerce. Assuming, then, that Congress, in enacting the Federal Employers' Liabiilty Act, intended not to take away the existing common law cause of action, but merely to provide additional remedies, counsel's contention that the declaration in the case states a common law cause of action is of course unassailable. That is true because—assuming the soundness of plaintiff's conception of the effect of the Federal statute—now, as before the passage of the Act, common law recovery may be had whether the parties are engaged in interstate or intrastate commerce.

But if our construction of the Federal Employers' Liability Act be correct, then it is equally clear that the declaration does not state a common law cause of action. It is our contention that Congress did not intend to give to the employe injured in interstate commerce the right to choose between the cause of action conferred by the statute and the old common law cause of action; that the statutory cause of action supplanted the common law cause of action and furnished the only redress to which the injured employe was entitled; that an allegation that the parties were engaged in interstate commerce was no longer an immaterial allegation, to be treated as surplusage, but became vital and indispensable to the statement of a cause of action under the statute, and became not merely unnecessary, *but fatal,* to the statement of a common law cause of action.

It may well be that as a matter of pleading—with which, of course, this Court is not now concerned—it is not necessary, in stating a common law cause of action, *expressly* to aver that the parties, or one of them, were engaged in intrastate commerce. But it is our contention that if effect is to be given to the Federal Em-

ployers' Liability Act the statement of a common law cause of action contains the necessary and absolutely indispensable *implication* that at least one of the parties was engaged in commerce purely intrastate. This is true, of course, since the Federal Act—construed as we think it should be—is exclusive in the field of interstate commerce and leaves the common law and State laws generally to prescribe rights and liabilities in respect of only those injuries sustained in commerce not interstate, that is, intrastate.

If, then, in every statement of a common law cause of action resides a necessary implication that the parties were *not* engaged in interstate commerce, it is clear that a declaration alleging *affirmatively* that the parties *were* engaged in interstate commerce does not, and cannot, state a common law cause of action.

But plaintiff's own statement of his position shows on its face that it is based on a construction of the Federal Act different from that for which we contend. He admits that the declaration states a cause of action under the Federal Employers' Liability Act, and then asserts that notwithstanding that fact it states a common law cause of action.

If the Federal statute is cumulative, not exclusive, his position is sound; but if the statute does create a cause of action which is exclusive, then of course the statutory cause of action and the common law cause of action cannot co-exist; the same state of facts cannot constitute a cause of action under the statute and a common law cause of action—it may constitute one or the other, but not both. If, then, the plaintiff were to admit that we are correct in the construction we have placed on the Federal act, then his admission that the declaration here involved states a cause of action under the statute is

tantamount to a statement that it does not state a common law cause of action.

It is perfectly obvious, therefore, that his ultimate premise—namely, that the declaration states a common law cause of action as well as a statutory cause of action —proceeds upon the theory that our construction of the Federal statute is incorrect and that the statute was not meant to abolish existing common law causes of action. Consequently, irrespective of the correctness of our view as to the effect of the statute, there is here involved a patent Federal question—namely, can a declaration alleging that the parties were engaged in interstate commerce, be held, consistently with the Federal Employers' Liability Act, to state a common law cause of action? If it cannot, then of course the trial court erroneously refused to hold that the Federal Employers' Liability Act constituted a complete bar to a common law recovery under the declaration in this case.

Likewise the Appellate Court of Illinois based its judgment of affirmance on precisely the theory to which, as we have just suggested, the plaintiff adheres.

The Appellate Court approached its discussion of the question we now are considering by stating the defendant's position as follows:

> "The defendant maintains * * * that inasmuch as the plaintiff's declaration purports to state in all its counts a cause of action under the Federal Employers' Liability Act, and in one also a cause of action under the Federal Safety Appliance Act, this eliminates the possibility in a legal and technical sense of its stating a cause of action under the common law of Illinois. * * * The defendant * * * insists that * * * the Superior Court of Cook County * * * was bound, on holding as it did that the participation of the cars in question in interstate commerce was not proven, to have instructed the jury that no cause of action as stated

in the declaration had been proven and that they should therefore return a verdict for the defendant."

The court then considered, in passing, the cases cited by defendant in support of its contention and then overruled the contention. The court stated clearly its reason for holding as it did, saying:

> "So far as expressions in the opinions cited and quoted may seem to give color to the contention that the mere statement in a declaration that the plaintiff was injured while engaged in interstate commerce must serve to render nugatory in a State Court the allegations which, without this one, show a complete cause of action under the common law of the State, they are and must from the nature of things be merely *obiter dicta* as applied to the case at bar. Rightly interpreted, however, we think there is nothing in the opinions signifying an intention so to hold. At all events, we think such a holding contrary to sound logic *and inconsistent with the well considered reasoning of many opinions in various jurisdictions that remedies given by statute for personal injuries may be cumulative and not in abrogation of a right of action at common law.*"

When it is considered that we have contended from the first that the Federal statute *was* "in abrogation of a right of action at common law"; that proceeding upon that theory we contended that a declaration, such as the one here involved, which states a cause of action under the statute, *cannot* state a common law cause of action *because the common law cause of action for injuries sustained in interstate commerce has been abolished by the statute;* that the Appellate Court overruled our contention on the express ground that in its opinion the Federal Statute should not be given the construction we claimed for it; we confess our utter inability to comprehend the reasoning process by which plaintiff concludes that the overruling of our contention does not raise a Federal question.

Plaintiff attempts to escape the consequences of the Appellate Court's language by saying that the question decided was one of general pleading and practice merely, involving no Federal question of which this Court can take jurisdiction. Clearly this is not so. We do not challenge the sufficiency of the declaration to state a common law cause of action before the Federal Employers' Liability Act was passed. If we did, then, of course, our controversy would be one concerning which the decision of the State courts necessarily would be final. But that is not our contention. Our contention is that assuming that prior to the enactment of the Federal statute, the State courts would have held the declaration here involved to contain a good statement of a common law cause of action, and would have held the allegations as to interstate commerce to be surplusage, *that cause of action itself* has been abolished. We challenge, therefore, not the sufficiency of any pleading, *but the very existence of the cause of action upon which recovery was allowed.* And since it is upon our construction of the Federal Employers' Liability Act that we rely as to the instrumentality which abolished that cause of action,—a construction which the State court declined to adopt—we have, clearly presented, not a question of the sufficiency of a pleading, but a question as to the effect upon substantive rights of a law of the United States.

But even if the Appellate Court had not indicated in express and unmistakable terms that it overruled the defendant's contention because it refused to hold that the Federal statute superseded the common law, the next step taken by the court in its argument would remove all doubt.

Immediately following the language we already have quoted, the court said:

"We hold that the allegations in the first, second

and fourth counts of the declaration, that the defendant was engaged and the plaintiff employed in interstate commerce were not descriptive of any fact or condition essential to recovery under the common law, if the other allegations of those counts were sustained, and that therefore they may be regarded as surplusage."

Even if the conclusion reached—namely, that the interstate commerce allegations would be treated as surplusage—did not so clearly appear to be the logical sequel to the court's holding as to the meaning of the Federal Employers' Liability Act, still it would require no argument to make it clear that on no other conceivable theory, except that the Federal act leaves unimpaired the common law cause of action, could the interstate commerce allegations be held to be surplusage. In other words, even if the court had not stated that in its opinion the Federal statute did not abrogate the existing common law cause of action, and had said only that it would treat the interstate allegations as surplusage, it would have been perfectly apparent that to reach that result the Federal statute necessarily had been construed just as the court now has said that it construes it.

Basing its holding on the theory that the statute did no more than provide new remedies and did not supersede the common law, the conclusion that the allegations respecting interstate commerce are surplusage is perfectly logical and reasonable. For, construing the statute in that way, a common law action could be maintained irrespective of the interstate or intrastate character of the commerce in which the parties were engaging. That being true, the plaintiff, in drawing his declaration and alleging that the parties were engaged in interstate commerce, would have stated a common law cause of action. And in such case the interstate commerce allegation could, of course, be treated as surplus-

age, since it was wholly superfluous and immaterial; if proved, it would neither aid nor defeat a recovery, nor would failure to prove it have the slightest bearing on the outcome. For, clearly, if the statute were so construed, it would not be essential to a common law recovery either to allege or prove that the parties were engaged in interstate commerce; nor would proof that they were in fact engaged in interstate commerce affect in the remotest degree the right to recover *on a common law cause of action*. Quite properly, therefore, if the Appellate Court's conception of the effect of the Federal Employers' Liability Act was correct, the interstate commerce allegation was held to be surplusage.

If, on the other hand, the Appellate Court had construed the statute as we contend it should have been construed, then, of course, the allegation that the parties were engaged in interstate commerce could not have been treated as surplusage. In such a case, we contend that the allegation would not only have been not *necessary*, in order to justify a recovery on a common law cause of action, but the allegation would expressly *negative* the right to recover on a common law cause of action, because that allegation would change the declaration from a statement of a common law cause of action to a cause of action utterly inconsistent with the common law cause of action—namely, the statutory cause of action.

It has never been suggested that an allegation which, while necessary to one cause of action, expressly negatives the existence of a second cause of action, can be disregarded as surplusage, thus leaving the remaining allegations to state the second cause of action. And, of course, the Appellate Court of Illinois—even if it had not expressly based its holding upon its construction of the Federal statute—would not be held to have intended so absurd and revolutionary a result. Fortunately, how-

ever, the court did not leave its intention to be ascertained by mere inference and speculation, but stated clearly the reasoning by which it arrived at the conclusion that the allegation could be treated as surplusage.

It is true that if the cause of action conferred by the Federal statute sustained the same relationship to the common law action as the crime of assault with intent to kill sustains to a simple assault, a plaintiff might allege a cause of action, under the statute, and prove a common law cause of action. In the case suggested it is held that the allegation of the greater offense will support a conviction for the lesser, on the theory that the lesser offense necessarily is charged in the allegation of the greater.

That, of course, presents no analogy to the situation we are considering. The cause of action conferred by the Federal Employers' Liability Act is not a cause of action, proof of part of the allegations necessary to support which establishes a common law cause of action. Unlike a simple assault, the common law cause of action is not merely a component part of a larger cause of action. If it were, then, of course, the allegation of the greater might reasonably be said to be a sufficient allegation of the lesser. That the one is not merely a part of the other—if our view of the Federal statute be correct—is clear, since each covers a separate and distinct field with which the other has no concern.

There is an absolute contradiction between a cause of action arising in *interstate* commerce in favor of a servant against his master, and a cause of action arising in *intrastate* commerce in favor of a servant against his master. The one cause of action is not and cannot be the same as the other cause of action, nor can the one include the other.

The true analogy is that of the offense of housebreaking, which can be committed only in the daytime, and the offense of burglary, which can be committed only in the night-time. A necessary description of the offense in the one case is that it took place in the daytime, and in the other case that it took place in the night-time. The offenses are absolutely contradictory in this, that if it appears that the offense was committed in the daytime, the defendant cannot be convicted of burglary, and if it appears that it was committed in the night-time the defendant cannot be convicted of housebreaking.

Suppose there had originally been a single offense, that of breaking into a dwelling house, and suppose thereafter that the two offenses are created, one of housebreaking in the daytime, the other of burglary in the night-time. It needs no discrimination to show that after the creation of the two offenses a pleader could not allege a burglary in the night-time and seek to convict of a housebreaking in the daytime, although prior to the creation of the contradictory offenses an allegation as to daytime or night-time might have been unnecessary.

So here there is a statute of the United States which defines a separate, independent cause of action. That cause of action, as a necessary part of its description, requires that the cause of action must arise in interstate commerce.

On the other hand, there remains the State statute or the common law applicable within a particular State. That common law or statute law of the State gives a cause of action which can apply only to an injury received in commerce which is not interstate. Any injury received in interstate commerce by a servant has been removed from the domain of State law and has been

separately and independently defined as a cause of action by another jurisdiction and another sovereignty—as an exclusive cause of action arising under the laws of that sovereignty.

At this juncture it is interesting to examine hastily the law of Illinois concerning surplusage.

The Appellate Court, in its opinion in the case at bar, cites *C. & G. T. R. Co.* v. *Spurney* (1902), 197 Ill. 471, as its authority for holding that the allegation we are here discussing was surplusage. The passage in the opinion of the Supreme Court in the Spurney case, to which the Appellate Court referred, is found at page 478 and reads as follows:

> "A variance between the proof and *immaterial* averments, which may be stricken out as surplusage *without destroying or changing the legal effect of the remainder*, is not fatal unless the allegations, though unnecessary, are descriptive of the identity of that which is legally essential to the claim, charge or defense." (Italics are ours.)

Would any one seriously argue that, *if our contention in respect of the effect of the Federal Employers' Liability Act be sound*, the striking out of the allegation as to interstate commerce would *not* change completely the legal effect of the declaration? With those words present the declaration states a cause of action under the statute and negatives the existence of a common law cause of action; without them, the declaration states a common law cause of action and negatives by implication the existence of a right of action under the statute. Striking out the allegation, therefore, not only changes the legal effect of the declaration—it literally transforms it.

Likewise, in *Consolidated Coal Co. of St. Louis* v. *Peers*

(1900), 97 Ill. App. 188, the court quoted and adopted Bouvier's definition of surplusage as

> "Matter wholly foreign and impertinent to the cause."

In *Adams* v. *Capital State Bank,* 74 Miss. 307, 20 So. 881, surplusage is held to be

> "whatever is extraneous, impertinent, superfluous or unnecessary."

The oldest definition in English law of surplusage is found in a Year Book of Edward I, where the court, quoting Porphyrius, says that surplusage is that which can be absent or present without detriment to the subject.

Generally speaking, any allegation which is wholly immaterial and which, therefore, is not required to be proved, is surplusage. But an allegation, proof of which would *defeat the action,* cannot be treated as surplusage —except in the instances where such allegation is repugnant to other material allegations in the pleading.

We desire here again to call attention to the fact that we are not primarily concerned in this argument with the correctness or incorrectness of the Appellate Court's ruling that the allegations we are considering were surplusage; we are trying rather to demonstrate that the only theory on which that conclusion *could* have been predicated, and the theory on which the opinion shows it *was in fact* predicated, was that the Federal Employers' Liability Act did not supersede the common law as to injuries sustained in interstate commerce.

Counsel say that the question of what may and what may not be treated as surplusage is a question on which the decision of the State courts is final; and with this contention, as a general proposition of law, we are willing, at least for the purposes of this argument, to agree.

But that rule of law obviously has no application where, as here, the ruling on the question of surplusage finds its only justification and support in, and proceeds directly and logically from, the refusal of the court to give to a Federal law the construction asked by the party aggrieved.

In this case, as we have said, it is apparent that the Appellate Court held that the allegation could be treated as surplusage because the cause of action given by the Federal statute does not abrogate the common law cause of action. Moreover, it seems to us that if the Appellate Court's construction of the statute were correct, the holding that the interstate commerce allegations were surplusage was altogether consistent and correct.

On the other hand, while there is convincing proof that the Appellate Court's holding on the question of pleading was actuated solely by the court's construction of the law—the chief evidences being the language we have quoted from the opinion—there is not the slightest justification for conjecturing that the court would have held as it did on the question of surplusage even if, as to the construction of the Federal Act, it had held in accordance with the defendant's contention. In fact, such a conjecture could be sustained only by attributing to the Appellate Court an utter lack of comprehension of the legal significance of surplusage, so that even if it were permissible for this Court to speculate as to what the Appellate Court *might* have held if it had held differently on the Federal question—which we submit is not permissible—such a conjecture would have to be summarily dismissed.

Moreover, even if the Appellate Court had stated expressly that its holding on the question of surplusage was wholly independent of the decision on the Federal question, such an assertion would not avail to defeat the

jurisdiction of this court. For a holding that the allegations respecting interstate commerce may be treated as surplusage—while consistent with the view of the Federal Act actually entertained by the Appellate Court—is so inconsistent and incongruous with the view of the Federal Act for which we contend, that an attempt by the Appellate Court to defeat the jurisdiction of this court by saying its decision was independent of the Federal question would be met by the doctrine announced in *Leathe* v. *Thomas* (1907), 207 U. S. 93, where it was said, at page 99:

> "It might appear that a State court, even if ostensibly deciding the Federal question in favor of the plaintiff in error, really must have been against him upon it, and was seeking to evade the jurisdiction of this court. If the ground of decision did not appear, and that which did not involve a Federal question was so palpably unfounded that it could not be presumed to have been entertained, it may be that this court would take jurisdiction."

Likewise, in *Vandalia R. Co.* v. *State ex rel. City of South Bend* (1907), 207 U. S. 359, the court said, at page 367:

> "Now the construction of a pleading, the meaning to be given to its various allegations and the determination of the validity of a contract made by parties in reference to real estate in the State are, as a rule, local questions. Doubtless this court is not concluded by the ruling of the State court and must determine for itself whether there is really involved any Federal question which will entitled it to review the judgment. * * * A case may arise in which it is apparent that a Federal question is sought to be avoided, or is avoided, by giving an unreasonable construction to pleadings."

Our ultimate complaint, then, is that the Appellate Court misconceived the effect of the Federal Employers' Liability Act, in refusing to hold that that Act superseded the common law and so constituted a complete de-

fense to a common law action for injuries sustained in interstate commerce; that in refusing to give to the Act the construction claimed for it by defendant the court denied the defendant a "right, privilege or immunity" conferred by the laws of the United States. It is useless for plaintiff to argue that the question involved is a question of pleading, governed by the State practice; for the ruling in respect of pleading was grounded upon the court's ruling in respect of the Federal question. The jurisdiction of this Court cannot be defeated by any such palpable subterfuge as that. Where the question of pleading is wholly independent of any Federal question, and the judgment can be sustained on the question of pleading alone, this Court will not review the judgment. But in this case the ruling on the question of pleading depended entirely upon the premise assumed in respect of the Federal question—namely, the construction of the Federal law—so that the denial of a Federal right is alone responsible for the affirmance of the judgment.

Apparently without contending that the fact is of any significance in the determination of the merits of the motion now before the Court, counsel has suggested in his argument that while the declaration contained, in each count, allegations sufficient to state a cause of action under the Federal Employers' Liability Act, yet the statute itself was not mentioned in the declaration. It is, of course, too well settled to admit of discussion that if the facts stated are the facts necessary to state a cause of action under the statute, the statute need not be pleaded nor need reference be made to it.

In *Cound* v. *Atchison, T. & S. F. Ry. Co.* (1909), 173 Fed. 527, that question was raised and the court declared that it was immaterial that the petition did not expressly rely upon the Federal statute, saying, at page 532:

"The present case grows out of and has its origin

in a law of Congress, and its correct decision depends upon the construction of that law. This court, therefore, having jurisdiction of the cause as one arising under a law of the United States, it is quite immaterial whether the plaintiff declare in his petition expressly upon the act, as in the present case he did in his original petition, or whether the pleadings be silent touching the jurisdictional averment. If the case arise—as did the case before the court—under the second section of the Employers' Liability Act—that is, if an employe of a carrier by railroad suffer personal injury from the negligence of the latter while employed in the performance of his duty, and such injury result from an accident occurring in the territories—appropriate allegations of such facts are alone sufficient to confer jurisdiction of the case upon a United States court without specially pleading the act or without referring to its provisions. This result follows necessarily, since in the case supposed, the suit is founded upon a law of the United States which it is the duty of Federal courts to take notice of and to enforce."

To the same effect are:

Clark v. *Southern Pacific Company* (1909), 175 Fed. 122.

Hall v. *Chicago, R. I. & P. Ry. Co.* (1906), 149 Fed. 564.

Since it is immaterial for the purpose of this motion whether our construction of the Federal statute or that adopted and applied by the Appellate Court of Illinois is the correct one—since in either case a Federal question is involved conferring jurisdiction upon this Court—we shall not enter upon any extended argument on that question. However, it seems to us that notwithstanding the holdings of a few State courts and possibly of inferior Federal courts to the contrary, the decisions of this Court have removed whatever doubt there may ever have been on this subject. *St. Louis S. F. & T. R. Co.* v. *Seale* (1913), 229 U. S. 156, is decisive of the question that

the Federal Employers' Liability Act supersedes all State laws, including the common law, in respect of injuries sustained in interstate commerce.

To the same effect is *Mondou* v. *N. Y., N. H. & H. R. Co.* (1912), 223 U. S. 1.

So, too, in *North Carolina R. Co.* v. *Zachary* (1914), 232 U. S. 248, it was held that the Federal Act governs, to the exclusion of State laws, cases coming within its purview.

Likewise it was said in *El Paso & Northeastern R. R. Company* v. *Gutierrez* (1909), 215 U. S. 87, that the purpose of Congress in enacting the Federal Employers' Liability Act was

> "to regulate the liability of employer to employe and * * * to *change* certain rules of the common law which theretofore prevailed as to the responsibility of negligence in the conduct of business for transportation."

And in *Cound* v. *Atchison, T. & S. F. Ry. Co.* (1909), 173 Fed. 527, the same conclusion was reached. There it was necessary for the court to consider the effect of the Federal Employers' Liability Act upon the common law duty theretofore resting upon railroad companies in respect of their servants and employes, and in this connection it was said:

> "When the act is analyzed it becomes apparent that it was the purpose of the Congress to confer rights and benefits upon the injured employe which were denied him by the common law and hence the existence of a common law right of action on the part of an injured employe cannot, in reason, be claimed in the presence of this act of Congress. Indeed, the act is the law and the only law under which suits like the present one may be brought."

Before concluding our discussion of the point here under consideration, we desire to call attention to the cases cited by plaintiff in support of the proposition that

"where a petition, or declaration, alleges that an accident arose in interstate commerce, but also states facts constituting a cause of action at common law, if the proof fails to show that the case did arise in interstate commerce, so as to come within the Federal Employers' Liability Act, yet recovery may be had at common law.

The first of the cases cited are *Jones* v. *C. & O. R. Co.* (1912), 149 Ky. 566; *Payne* v. *N. Y., etc., R. Co.* (1911), 201 N. Y. 436, and *Acardo* v. *N. Y., etc., T. Co.* (1907), 116 App. Div. (N. Y.), 793. These cases bear out our contention, stated hereinabove, that to hold that common law recovery could be had on a declaration alleging that the parties were engaged in interstate commerce is perfectly reasonable *if it be held that the Federal act is not exclusive* in its field. For, of course, the courts of New York do hold that the Federal act is not exclusive; and the Kentucky court, in the Jones case, *supra*, reached the same conclusion.

Atkinson, Rec., v. *Bullard, Admnx.* (Ga. App., 1913), 80 S. E. 220, also is relied upon. In that case, as appears clearly from the opinion, a common law cause of action was stated in *one count* and a cause of action under the Federal statute was stated in *another count*. In that situation the court held that it was permissible for the plaintiff to set forth the cause of action in two separate counts, alleging in one count the right to recover under the Federal law upon the theory that the deceased was engaged in interstate commerce, and in the other count basing the right to recover under the state law upon the theory that the deceased was engaged in intrastate commerce.

The court said on this point at page 221:

> "We know of no reason why a plaintiff suing a railroad company for damages for a tortious homicide cannot allege in one count that the decedent

was engaged in interstate commerce, and in another that he was engaged in intrastate commerce."

Likewise, *Erie R. R. Co.* v. *Kennedy* (1911), 191 Fed. 332, is cited by the plaintiff. In that case the petition contained no allegation as to whether the injury occurred in interstate or intrastate commerce. Since the proof offered at the trial tended to establish that the parties were engaged in interstate commerce, the court allowed the question of liability to go to the jury on the theory that it tended to prove a cause of action arising under the Federal Employers' Liability Act. If, in that case, the petition had affirmatively alleged that the parties were engaged in intrastate commerce, and the court had allowed the case to go to the jury under the Federal Employers' Liability Act, there might be some justification for contending that the case was analogous to the case at bar. As it is, it has not the slightest bearing.

The case of *Howerton* v. *Southern Ry. Co.* (Ind. App. 1913), 101 N. E. 121, holds merely that if a complaint alleges acts which bring the case within the purview of the Federal Employers' Liability Act, it is sufficient to entitle the injured party to the benefit of the statute, and it is immaterial whether the complaint mentions the Federal Employers' Liability Act.

II.

THE RIGHT CONFERRED BY THE FEDERAL EMPLOYERS' LIABILITY ACT WAS CLAIMED IN THE COURTS OF ILLINOIS AND WAS THERE EXPRESSLY DENIED.

Plaintiff's next contention is that the right or immunity which defendant now claims was not "especially set up or claimed" in the State courts; and that, therefore,

the question, being first raised in this Court, is presented too late. This contention, in view of the record in this case, is wholly groundless.

Each count in the declaration stated a cause of action under the Federal laws. The first count was for a cause of action based on the alleged negligence of the employer toward his employe, while both were engaging in interstate commerce. This cause of action existed by reason of and was given by the Federal Employers' Liability Act. (Rec., 4-7.)

The second count set up a cause of action arising out of the alleged insufficient drawbars under the Federal Safety Appliance Act while both employer and employe were engaging in interstate commerce. The third and fourth counts were of the same general description as the first count. Hence all the counts were for causes of action arising and existing under Federal laws. There was no count alleging a cause of action based upon the common law or the laws of the State of Illinois. (Rec., 8-19.)

At the end of the evidence the defendant asked the court to give a peremptory instruction for the defendant. (Rec., 335.) This request meant that it is asserted that the evidence was not sufficient to prove the cause or causes of action alleged. The court overruled and denied this motion and refused this instruction, the defendant excepted and thereby the court decided a Federal question because the declaration set up causes of action under *Federal laws only.* (Rec., 337.) Necessarily, in declining to give the peremptory instruction asked by the defendant, at the same time holding that the allegations in respect of interstate commerce had not been proved, the court declined to give effect to the Federal Employers' Liability Act. If our construction of the Act was correct the declaration did not state a common

law cause of action; and consequently, in asking that the case be taken from the jury, the defendant demanded that full effect be given the Federal act as abrogating the old common law cause of action; and in submitting the case to the jury on the theory that it did state a common law cause of action the court held necessarily that the Act did not have the effect that defendant claimed for it.

That a Federal right is sufficiently "set up and claimed" by a motion for a directed verdict was held by this court in *St. Louis, I. M. & S. R. Co.* v. *McWhirter* (1913), 229 U. S. 265.

In that case the petition alleged an injury to an employe by the negligence of the employer while they were engaging in interstate commerce. At the close of the evidence the defendant requested the court to instruct the jury to find in its favor. The court refused to do so and the defendant excepted, and there was judgment for the plaintiff. This judgment was affirmed by the highest court of Kentucky, and a writ of error was taken from the Supreme Court of the United States.

Defendant in error moved to dismiss the writ of error for want of a Federal question. It was contended that under the pleadings a cause of action under the Federal laws and a cause of action under the State laws were presented, and that the court had affirmed the case under the State laws, and, therefore, there was an independent ground of decision not involving the Federal statutes.

But the Supreme Court of the United States, saying that the cause of action set up was under the Federal law, laid down the proposition that since

> "*the defense, therefore, alone involved determining whether there was liability under the statute, the mere statement of the case involved the Federal right,* and necessarily required from a general point of view its determination."

From the decisions in the McWhirter case, in *St. Louis, etc., R. Co.* v. *Seale* (1913), 229 U. S. 156, and in *Troxell* v. *Delaware, L. & W. R. Co.* (1912), 227 U. S. 434, it is apparent that when the State court decided that although no cause of action was proved under the Federal statutes, nevertheless, under a pleading setting up a cause of action under Federal laws a recovery could be had for a cause of action under State laws, it was deciding merely another Federal question. As said by the Supreme Court in the McWhirter case, *supra,* the argument that no Federal question is saved for review reduces itself to the contention that the power to review a Federal question which has been expressly decided by a State court does not obtain where such court has also decided another Federal question. While it may be true that under ordinary circumstances a decision whether a recovery could be had for a cause of action arising under State laws or the common law does not involve a Federal question, nevertheless when it is decided that such recovery can be had under a declaration setting up *only causes of action under the Federal law,* such a decision involves by its very terms a Federal question, for it involves the question whether the statement of a cause of action under the Federal statute *includes* the statement of a common law cause of action. This question depends for its answer, of course, upon the construction to be given the Federal statute.

But even if the *McWhirter* case left any possible doubt as to the sufficiency of defendant's acts in the trial court to preserve the Federal question, that doubt would be dispelled by the proceedings in the Appellate Court of Illinois. Both of the parties considered the question as to which of the two possible constructions of the Federal Employers' Liability Act was the correct one, as

the controlling question in the case. This is so apparent from the printed argument addressed to the Appellate Court of Illinois that it is inconceivable that counsel now can contend seriously that the question is being raised here *for the first time.*

In the opening sentence of plaintiff's brief in the Appellate Court, plaintiff says:

> "The constitutionality of the act is not questioned; in fact, *defendant relies upon it as* a defense."

In the third division of his brief plaintiff argues the question exhaustively under the caption "The Employers' Liability Act Is Not Exclusive or in Abrogation of a Right of Action at Common Law, and Recovery by Plaintiff Was Justifiable in This Case Under the Common Law." To this argument is devoted ten printed pages of his brief. And by way of showing the admission by plaintiff that the decision of the Appellate Court on the question of surplusage was based on its construction of the Federal statute, we quote the following from plaintiff's argument:

> *"If, therefore, the common law was not abrogated by the Federal act,* and if, as we will attempt to demonstrate under a subsequent heading, the proof established a cause of action at common law, the *next question* is as to whether plaintiff is precluded from recovery under the common law because of the state of his pleadings."

It is clear that the plaintiff considered the question of the construction of the Federal statute not only to have been raised in the State courts, but also to have been absolutely vital to a determination of the case.

Likewise the other view of the effect of the Federal Employers' Liability Act was pressed and argued at length by the defendant in the Appellate Court.

But irrespective of the understanding, or want of understanding, by plaintiff of the position assumed by the

defendant in the State courts, the opinion of the Appellate Court shows clearly and unmistakably that the Federal question not only was raised by the defendant, but was decided by the Appellate Court adversely to the defendant's contention.

The gist of defendant's contention in the Appellate Court of Illinois is stated by the Appellate Court in its opinion as follows:

> "The defendant maintains * * * that inasmuch as the plaintiff's declaration purports to state in all its counts a cause of action under the Federal Employers' Liability Act and in one also a cause of action under the Federal Safety Appliance Act, this eliminates the possibility in a legal and technical sense of its stating a cause of action under the common law of Illinois."

This is precisely the Federal question which we claim is here involved, and it is too clear for argument that that claim was urged in the State courts.

That the Appellate Court held adversely to that contention is equally clear, for, in overruling the contention of defendant, the court said:

> "We think such a holding contrary to sound logic and inconsistent with the well-considered reasoning of many opinions in various jurisdictions that remedies given by statute for personal injuries may be cumulative and not in abrogation of a right of action at common law."

And in support of this conclusion the court cited *Kleps* v. *Bristol Manufacturing Company*, 189 N. Y. 516, and *Payne* v. *New York S. & W. R. R. Co.*, 201 N. Y. 436.

It is settled law, established by the decisions of this Court, that a Federal right is sufficiently set up or claimed in the State court to satisfy the requirements of Section 237 of the Federal Judicial Code, irrespective of the time when the question is raised, if the State court actually passes upon the question so raised.

In *Chambers* v. *Baltimore & Ohio Railroad Co.* (1907), 207 U. S. 142, the defendant in error moved to dismiss the writ of error for want of jurisdiction on the ground that outside of what was said in the opinion of the State court it could not be discovered except by inference, that any right under the Federal constitution had been set up or claimed in the State court. However, in overruling the motion to dismiss, this Court said, at page 148:

> "The defendant objects to our jurisdiction to re-examine the judgment because the Federal question was not properly and seasonably raised in the courts of the State, but it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to re-examine that question on writ of error."

In the recent case of *North Carolina R. Co.* v. *Zachary*, 232 U. S. 248, it was held in a case which, like the case at bar, involved the question of the effect to be given the Federal Employers' Liability Act, that the Federal question is sufficiently raised so long as the "highest court of the state either decided or assumed that the record sufficiently presented a question of Federal right, and decided against the party asserting that right."

Moreover, it has been held repeatedly that even where the Federal question is raised for the first time on petition for re-hearing in the highest court of the State, the question is raised in apt time, provided only that the State court, in passing upon the petition for re-hearing, considers on the merits the question so raised and decides it adversely to the petitioner. In *McKay* v. *Kalyton* (1907), 204 U. S. 458, in retaining jurisdiction of the case, the court said, at page 463:

> "True it is that the immunity which was asserted

was first claimed in a petition for rehearing, but as the question was raised, was necessarily involved and was considered and decided adversely by the State court there is jurisdiction."

To the same effect are *Kentucky Union Company* v. *Kentucky* (1911), 219 U. S. 140; *Illinois Central R. R. Co.* v. *Kentucky* (1910), 218 U. S. 551, and *Mallett* v. *North Carolina* (1901), 181 U. S. 589.

In *Nutt* v. *Knut* (1906), 200 U. S. 12, this Court said, in overruling a motion to dismiss for want of jurisdiction:

> "A party who insists that a judgment cannot be rendered against him consistently with the statutes of the United States may be fairly held within the meaning of Section 709 to assert a right and immunity under such statutes."

In *Green Bay and Mississippi Canal Company* v. *Patten Paper Company* (1898), 172 U. S. 58, the court said, at page 67:

> "No particular form of words or phrases has ever been declared necessary in which the claim of Federal rights must be asserted. It is sufficient if it appears from the record that such rights were specially set up or claimed in the State court in such manner as to bring it to the attention of that court."

In that case the court quoted with approval from *Powell* v. *Brunswick County*, 150 U. S. 440, as follows:

> "If it appear from the record by clear and necessary intendment that the Federal question must have been directly involved, so that the State court could not have given judgment without deciding it, that would be sufficient."

III.

CONCLUSION.

In conclusion we respectfully submit that the Appellate Court of Illinois denied to the defendant a right claimed under the Federal Employers' Liability Act; that that right was set up and claimed in the State courts, and that the denial of that right so claimed raises a Federal question of which this Court has jurisdiction.

We respectfully insist, therefore, that defendant in error's motion to dismiss should be overruled.

Respectfully submitted,

J. L. MINNIS,
JOHN M. ZANE,
CHARLES F. MORSE,
Attorneys for Plaintiff in Error.

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CASES CITED.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1913.

No. 843.

WABASH RAILROAD COMPANY,
Plaintiff in Error,

vs.

JOHN R. HAYES,
Defendant in Error.

Writ of Error to the Appellate Court of Illinois, First District.

MOTION TO DISMISS AND BRIEF THEREON, BY DEFENDANT IN ERROR.

MOTION TO DISMISS.

And now comes defendant in error, and shows to the court here that it is without jurisdiction to review this cause, and that the writ of error herein was sued out merely for delay, as will more fully appear from the brief in support of this motion herewith filed.

Wherefore, defendant in error prays that the writ of error, in said cause, be dismissed for want of jurisdiction; and that additional damages be assessed and awarded defendant in error, as for delay, etc.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

STATEMENT.

May it please the Court

Notice of the above motion to dismiss has been duly served upon plaintiff in error herein, together with a copy of such motion and a copy of the brief in support thereof, in apt time, as will more fully appear from the original motion to dismiss, now on file in the office of the Clerk of this court, and the receipt or endorsement thereon of counsel for plaintiff in error, a copy of which notice and endorsement and motion is also set forth in the appendix to this brief, pp. 1, 2.

Defendant in error has also printed and filed herewith in the appendix to this brief such portions of the record herein, together with the record pages, as are deemed necessary for a consideration of this motion to dismiss. The opinion of the Appellate Court of Illinois is also printed in full in the appendix hereto (pp. 41-54).

This writ of error is sued out by the plaintiff in error to reverse a judgment of the Appellate Court of Illinois, for the First District, affirming a judgment of the Superior Court of Cook County, Illinois, there rendered on a purely common law liability, in favor of defendant in error, and against the plaintiff in error, in an action to recover damages for personal injuries. The plaintiff in error here was the defendant in the trial court, and we shall, for convenience hereafter, refer to the parties as plaintiff and defendant, as they were in the trial court.

The declaration filed in said cause consists of four counts in each of which it is alleged, in substance, that on July 9, 1908, the defendant possessed and operated a railroad extending from Chicago into different states, and had a certain switch track at Chicago, running from its tracks into a grain elevator, and that plaintiff was then and there employed by the defendant, as a switchman, and required to switch cars into and out of said elevator, upon and over said switch track. (Rec., 4.)

The first count states a complete cause of action at common law based upon the Railroad Company's negligence in permitting said switch track to become and remain in a defective condition of repair, and in consequence of which plaintiff, while exercising ordinary care for his own safety, was injured in the manner therein described. This count does not allege the violation of any statute, nor does it state that the cause of action is based upon any statute; in fact, it does not mention any statute at all. It does, however, allege, in substance, that both Hayes and the Railroad Company were engaged in interstate commerce at the time of the accident. (Rec., 4-7.)

The second count also states a complete cause of action at common law; that is to say, it states the same cause of action stated in the first count; but it also charges that plaintiff and the Railroad Company were engaged in interstate commerce at the time of the accident, and that the height of the couplers on the two cars mentioned did not conform to the standard fixed by the Interstate Commerce Commission pursuant to the Act of Congress in that regard; and that defendant unlawfully and negligently

hauled the car in moving interstate commerce, when and while the couplers did not comply with said standard; and it charges that as a direct result and in consequence of the improper condition of the track, *and* of the couplers not conforming to the standard height mentioned, the cars became uncoupled, and plaintiff was injured, as therein described. (Rec., 8-12.)

The third count also states a complete cause of action at common law, namely, the same cause of action stated in the first count, but in addition thereto, it also charges that both plaintiff and the Railroad Company were engaged in interstate commerce at the time of the accident. And in addition to the same charge of negligence in respect to the condition of the track, as is contained in the first count, it also charges negligence upon the part of the engineer of the train. And it charges that as a direct result and in consequence of the improper condition of the track, and of the negligence of the engineer, the cars became uncoupled, and plaintiff was injured in the manner therein stated. This count, like the first count, does not mention any statute. (Rec., 13-16.)

The fourth count charges a complete cause of action at common law, in respect to the improper condition of the brake; but it also charges that Hayes, and the Wabash Railroad Company, were engaged in interstate commerce at the time of the accident, but it does not mention any statute. (Rec., 17-18.)

Question Involved.

In order that the court may have early in mind the issues involved in this writ of error and motion

to dismiss, we deem it well to here state that the question involved, in this court is the sufficiency of the above declaration to support a common law liability in the State Court, the proof as to interstate commerce having been, by the defendant's procurement, held insufficient; and did the decision of this question in the affirmative by the State courts, deny the defendant a right or immunity accruing to it under the Federal Employer's Liability Act, and did the defendant especially set up and claim the same in the State courts.

To this declaration the defendant pleaded the general issue. (Rec., 20.) Thereafter, in April, 1910, a trial was had in said court before a jury, resulting in a verdict in plaintiff's favor (Rec., 24, 393), upon which judgment was rendered for the sum of $14,000 and costs. (Rec., 26, 397.) The defendant appealed from this judgment to the Appellate Court of Illinois for the First District. (Rec., 397.)

During the trial, and at the end of plaintiff's case, the defendant made its written motion to instruct the jury to find the defendant not guilty, and assigned as the *only ground* for such motion a variance

"between the proof and the declaration, the proof showing that the injury was caused by the plaintiff's head being struck by the pillar standing close to the track, and not by any act of negligence alleged in the declaration,"

and presented with said motion a written instruction to find the defendant not guilty. This motion was denied and the instruction refused. (Rec., 187-188.)

At the end of the whole case, the defendant again made a written motion to instruct the jury to find the defendant not guilty, presenting therewith its written instruction to that effect. This motion was

also denied and the instruction refused. (Rec., 335-337.) To the denial of both of which motions to so direct, and the refusal of both instructions, the defendant duly excepted.

In neither of these motions was there any mention made by the defendant that it claimed any right or immunity of a Federal nature, or under any Federal statute.

The case was submitted to the jury upon four instructions in writing, given at plaintiff's request (365-369), and 23 instructions given at defendant's request. Among the given instructions, requested by the defendant, was one to the effect that the *evidence was insufficient to prove the allegations of interstate commerce and that therefore neither the Federal Liability nor Safety Appliance Acts had any application to the case.* (Instruction 4, Rec., 379.)

This instruction No. 4, given at defendant's request, was the only instruction, either given or refused, which was requested by the defendant, that contains any mention of any Federal law, and in no other instruction, either given or refused, was there any mention of any Federal right, or immunity, claimed by the defendant; and in this instruction No. 4 the defendant secured just what it sought, as the instruction was given without modification.

The other instructions given at the request of the defendant, relating to the question of liability, were based entirely and exclusively on its common law liability, and as set forth in the declaration. In other words, the defendant succeeded in obtaining the submission of only its common law liability to the jury.

In six instructions given at the request of the de-

fendant, the jury were charged that there could be no recovery whatever, if the plaintiff was guilty of negligence contributing to the injury. (16, Rec., 371; 13, Rec., 372; 19, Rec., 373; 11, Rec., 374; 21, Rec., 376; 3, Rec., 380.) Also, in defendant's instructions 10 (Rec., 382) and 9 (Rec., 383), the jury were charged that there could be no recovery for the negligence of the other members of the crew. These defenses were available to the defendant in a common law cause of action, but not in an action under the Federal Act.

After verdict, the defendant filed its written motion for a new trial, in which seven grounds were mentioned, but no mention whatever was therein made that the defendant had or claimed any right, or immunity, whatsoever under the Federal laws or constitution, etc. (Rec., 394, 396.) The nearest that any of the grounds mentioned in this motion could come to covering any Federal question would be assignment No. 7 (Rec., 395), which is: "The verdict is against the law and the evidence in the case." This motion for a new trial, however, was denied, as was also a motion in arrest of judgment, and judgment was entered on the verdict; to all of which the defendant objected and excepted, and prayed and obtained an appeal to the Appellate Court for the First District. (Rec., 397.)

In the Appellate Court defendant assigned nine grounds for error, but among these, also, there is none that makes any mention of a denial, of any Federal right, or immunity; but, as in the motion for a new trial the verdict and judgment are as-

signed as contrary to the law and the evidence. (Rec., 401, 402.)

In the Appellate Court the judgment of the Superior Court was affirmed. (App. Ct. Rec., 12; 180 Ill. App., 511; Appendix, pp. 41-54.) This judgment of the Appellate Court, it is conceded, is the judgment of the highest court, in which a decision in this case could be had, but it is strenuously denied by the plaintiff that, aside from instruction 4, either any Federal right, or immunity, was especially set up, or claimed by the defendant, or that any such right, or immunity, was denied, whether set up and claimed as such or not.

In the assignment of error in this court, the defendant for the *first time* refers to any Federal Law, under which it claims some right, or immunity, that it contends has been denied it. This assignment in this court is that the Appellate Court of Illinois erred in not reversing the judgment of the Superior Court,

"on the ground that under the declaration in the said cause in the said Superior Court of Cook County, and under the proof offered on the trial of said cause, the said plaintiff in said cause could not recover against the said defendant for a cause of action set up under the said statute of the United States, to-wit, the statute in force April 22, 1908, Chapter 149; 35 Stat. at L., 65." (Appendix, p. 39.)

This assignment is somewhat ambiguous. The plaintiff did not in this case recover "for a cause of action set up under the said statute of the United States, etc.," but recovered for a cause of action solely under the common law, and this is conclusively shown by the record aforesaid. From ar-

guments heretofore made, however, we assume that by this assignment the defendant intends to make the claim that a recovery could not be had in the Superior Court of Cook County, for a common law cause of action, on the declaration in this case, because of some right or immunity conferred upon the defendant by the statute in question, namely, the Federal Employers' Liability Law.

There certainly is nothing in this Act which requires, even in those cases which the Act governs, that questions of mere state or common law pleading and practice be decided in any particular way, and the assignment does not show, nor mention, any right or immunity, under the Act, that has been denied it. But, it may be urged by the defendant that since the Federal Act is exclusive, and supersedes all state statutes and the common law, so far as liability is concerned, therefore, where a declaration, as here, although alleging negligent acts which are actionable at common law, also alleges that the parties at the time were engaged in interstate commerce, this latter allegation absolutely precludes the right to recover under the common law, where the defendant itself succeeds in its contention that the interstate allegations are not proved and that the Federal Law is not applicable. But treating the assignment in question as equivalent to such a claim, it does not, and cannot, present a question cognizable by this court. It presents merely a question of general law on a question of pleading and practice arising in a state court in a case where the recovery was solely on the common law.

We shall here call the court's attention to the fact

that it is only for the purpose of this motion to dismiss that plaintiff concedes that the accident did not occur in interstate commerce, and that the Federal Liability Act, therefore, was not applicable to the case. The defendant succeeded in inducing the trial court to so hold and to confine the plaintiff to his common law rights of recovery, and it was fortunate for plaintiff that the negligence complained of constituted a cause of action, even as so restricted. Now, while plaintiff's rights, under the Federal Act, have perhaps been denied him by the ruling that the case was not governed by the Federal Law, that very ruling itself precludes the defendant from claiming any right or immunity under such law, *for it is not under it.*

I.

POINTS RELIED ON BY PLAINTIFF IN MOTION TO DISMISS.

First.

(a) The so-called right, or immunity, now claimed as arising under the Federal Liability Act was not "especially set up or claimed" in the State Court; neither was it denied or even decided, and hence no right of review by this court exists.

(b) Such claim being made in this court for the first time comes too late.

(c) The Federal Act in question applies only to cases arising out of interstate commerce. And since defendant induced the court to hold, as a matter of law, that the allegations as to such commerce were not proved, and that the Federal Act had no application to the case, the defendant has no rights, or immunities under such Act.

Second.

(a) But even if defendant's claim, as now made, had been especially set up as a right, or immunity, under the Federal Act, it was not such but was merely a question of general law relating to pleading and practice in the State Court and does not present a Federal question.

(b) On the merits the ruling of the State Court, on this question of pleading, was correct.

II.

BRIEF OF ARGUMENT.

First.

The so-called Right or Immunity, now claimed as arising under the Federal Liability Act was not "especially set up or claimed" in the State Court; neither was it denied or even decided, and hence no right of review by this court exists.

Section 237 of the Federal Judicial Code (being the same as old Section 709) is the section under which this writ of error is prosecuted, and that part involved herein is as follows:

"A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, * * * where any title, right, privilege or immunity is claimed under * * * any statute of * * * the United States, and the decision is against the title, right, privilege, or immunity *especially set up or claimed,* * * * may be re-examined and reversed, etc."

sume the declaration has well stated it, and the judgment must stand, but if upon *no* theory of law a recovery could be sustained under the evidence, then the judgment must be reversed."

See, also, to the same effect:

Hefling v. *Van Zandt,* 60 Ill. App., 662 (664).

Ill. Steel Co. v. *Schymanowski,* 59 Ill. App., 32.

In *Gascoigne* v. *Met. El. Ry. Co.,* 239 Ill., 18, it is said on this point (p. 21):

"The variance, however, was not pointed out in any manner in the trial court. A *general instruction* to direct a verdict for the defendant was asked both at the close of appellee's testimony and at the close of all the testimony and refused in each instance by the trial court. Had a *specific objection as to this variance* been made on the trial, it could have been obviated by amending the declaration. *The objection comes too late in this court.* (*Indianapolis & St. Louis Railroad Co.* v. *Estes,* 96 Ill., 470; *Consolidated Coal Co.* v. *Wombacher,* 134 Ill., 57.)"

See, also, to same effect:

Chi. & G. T. Ry. Co. v. *Spurney,* 197 Ill., 471 (477).

Chicago City Ry. Co. v. *McClain,* 211 Ill., 589 (593).

In *Railroad Co.* v. *Morgan,* 160 U. S., 288, where it was claimed that a motion to direct a verdict, although general, was sufficient to raise a Federal question, it was said by this court (p. 292):

"Neither in defendant's pleadings, nor in the motion to direct the jury to find for defendant, nor in the objection and exceptions to the instructions, were any such rights *specifically* set up or claimed."

Because not so set up, it was held that no ground of Federal jurisdiction existed under Section 709, and the writ of error was dismissed.

In *Erie Railroad Co.* v. *Purdy*, 148 U. S., 154, where a writ of error was prosecuted to reverse the judgment of a State Court, on the ground that the State Court had denied the plaintiff in error rights guaranteed under the Fourteenth Amendment, it is said (p. 153):

"The statements in the motion for non-suit, that 'the cause of action alleged in such action has not been proved,' and that 'no cause of action has been proved in either of the actions consolidated in the action on trial,' were *too vague and general* to indicate that defendant claimed anything under the amendment. The record before us is consistent with the idea that the defendant did not claim, in the trial court, in any form, general or special, that the statute deprived it of its property without due process of law, or denied to it the equal protection of the laws."

The writ of error was accordingly dismissed for want of jurisdiction.

From the foregoing it seems clear that under the Illinois practice, as well as the Federal requirements, the motion to direct a verdict did not raise the question of defendant's right to have the question of the sufficiency of the declaration decided in any particular way by reason of any Federal statute. It also seems too clear for argument that if defendant had made the objections to the declaration above mentioned during the trial, plaintiff would have amended his declaration, or at least would have filed additional counts setting up the same matter without the allegations as to interstate commerce.

The motion made by defendant in error, in arrest

of judgment (Rec., 397), did call into question the sufficiency of the declaration, as a matter of general law, but no mention is made in such motion of any right, or immunity, claimed under the Federal Law, and, therefore, that matter was not specifically set up, or claimed, in such motion. It is true, the question might have been argued under this motion, but this court should not assume that it was so argued, merely because the record is silent in that respect. It certainly was not raised in the manner required to present a Federal question. This is especially true because of the fact that in its instruction number 4 asked, the defendant made certain specific claims as to the Federal Law and its application to the case, which, as we have seen, were allowed by the court. Under such circumstances the natural and legal inference is that the defendant made no other claims of rights, or immunities, arising under such Act.

Neither was there any ground mentioned in defendant's motion for a new trial, which, under the State or Federal practice, was sufficient to raise or cover the claim now made.

In Sec. 77 of the Illinois Practice Act (R. S., Chapter 110) it is provided that:

"* * * If either party may wish to except to the verdict, or for other causes, to move for a new trial or in arrest of judgment, he shall, before final judgment be entered, or during the term it is entered, by himself or counsel, file the points in writing *particularly specifying* the grounds for such motion. * * * "

It is only such grounds as are specifically covered by the motion for a new trial that can be considered

in the Courts of Appeal in Illinois, and all grounds not set forth specifically are deemed waived.

Yarber v. *Chicago & Alton Ry. Co.*, 235 Ill., 589.

West Chicago St. R. Co. v. *Krueger*, 168 Ill., 586.

Voight v. *Anglo-American Provision Co.*, 202 Ill., 462.

Janeway v. *Burton*, 201 Ill., 78.

Pursuant to the above statute, defendant filed its written motion for a new trial (Rec., 394, 395), the only assignment of which, that might in any manner be considered as broad enough to cover the question involved, was the ground assigned that the verdict was against the law and the evidence, and a similar assignment of errors was made on appeal in the Appellate Court. (Rec., 402.) Neither of these was sufficient, however, to cover the claim now made.

The Illinois practice also limits the points considered by the Appellate Courts to those which have been duly assigned as error and all others are deemed waived.

Taylor v. *Wright*, 121 Ill., 455.

Pa. Co. v. *Conlon*, 10 Ill. App., 21.

Pa. Co. v. *Bond*, 99 Ill. App., 535.

McCalleb v. *Drainage District*, 190 Ill., 594.

In *Bridge Co.* v. *Illinois*, 175 U. S., 626-635 (p. 634), on the question of the particularity required in making a claim of a Federal right, in quoting from *Oxley Stave Co.* v. *Butler County*, 166 U. S., 648, the court says:

" 'In other words, the court must be able to see clearly from the whole record that a provision of the

Constitution or Act of Congress is relied upon by the party who brings the writ of error, and that the right thus claimed by him was denied. * * * It is not enough that there may be *somewhere hidden in the record* a question which, if raised, would be of a Federal nature. * * * A claim or right which has never been made or asserted cannot be said to be denied by a judgment which does not refer to it. * * * Nor can it be said that the necessary effect in law of a judgment which is silent upon the question is the denial of a claim or right which *might* have been involved therein, but which, in fact, was never in any way set up or spoken of.' "

In *Michigan Sugar Co.* v. *Dix*, 185 U. S., 112-114 (p. 114), it is said:

"The rule is firmly established, and has been frequently reiterated, that the jurisdiction of this court to re-examine the final judgment of a state court, under the 3d division of Sec. 709, cannot arise from *mere inference*, but only from averments so *distinct and positive* as to place it *beyond question* that the party bringing the case here from such court intended to assert a Federal right. The statutory requirement is not met unless the party *unmistakably declares* that he invokes, for the protection of his rights, the Constitution, or some treaty, statute, commission, or authority, of the United States."

The case of *Railroad Co.* v. *Duvall*, 225 U. S., 477-488, is quite similar to the case at bar. In the *Duvall* case, suit was begun in a state court of North Carolina by an employe of the Railroad Company to recover damages for personal injuries. The liability claimed arose *under* the Federal Employer's Liability Act and suit resulted in a verdict and judgment in favor of the plaintiff, which was affirmed by the Supreme Court of the state, and a writ of error was sued out of this court to the State Court. Although

the plaintiff's right to recover in the case *was expressly based upon the Federal Act*, it was held that the case was not reviewable by this court, and the writ of error was dismissed for want of jurisdiction. From the record it appeared that certain instructions asked by the defendant were refused, but none of them was based upon any right, privilege, or immunity, growing out of the Federal Act. As to these requests, this court (p. 484) said:

"Not one of the requests asks any definite construction of any part of the Employer's Liability Act, or, indeed, contains any reference whatever to the Act."

But the claim was also made by the Railroad Company in this court, that the plaintiff below, at the time of his injury, was not engaged in the discharge of any duty that he owed the defendant, and that, therefore, the defendant was not liable under the Federal Act. But the record did not show that any specific claim, such as this, was made during the trial or in the State Court, and in passing upon this phase of the case this court (p. 486) said:

"This action was brought under an Act of Congress. If the Act has been erroneously construed and exception saved, or if a *particular construction* to which the party asking was entitled was denied, a right has been denied under the statute, and the question may be reviewed by this court. In *St. Louis I. M. & S. R. Co.* v. *Taylor*, 210 U. S., 281, it was said: 'Where a party to litigation in a state court insists, by way of objection to or request for instructions, upon a construction of a statute of the United States, which will lead, or, on possible finding of facts from the evidence may lead, to a judgment in his favor, and his claim in this respect, *being duly set up*, is denied by the highest court of the state, then the

question thus raised may be reviewed in this court.' * * * It was the obvious duty of counsel, if they wished *any particular construction* of the Act, to put the request *in such definite terms* as that the attention of the court might be directed to the point, and the record here should show that the right now claimed was the right '*specially set up*' and denied by the court. 'It must appear on the face of the record that it *was in fact raised;* that the judicial mind of the court was exercised upon it; and then a decision against the right claimed under it.' "

The decision in this case, and the language above used, was in the face of a certificate from the Supreme Court of North Carolina, which stated that there *was* drawn in question a right, privilege, or immunity, claimed by the defendant under a statute of the United States, which was *specially set up and denied.* But this court held that such certificate on the part of the State Court did not confer jurisdiction, or show that the claim had been specially set up and denied.

See, also, to the same effect:

Waters-Pierce Oil Co. v. *Texas,* 212 U. S., 86.

C. & O. Ry. Co. v. *McDonald,* 214 U. S., 191.

The attempt now made by defendant in this court for the first time to raise a Federal question by its assignment of error here comes too late.

Mallers v. *C. L. & T. Co.,* 216 U. S., 613.

Appleby v. *Buffalo,* 221 U. S., 524.

Waters-Pierce Oil Co. v. *Texas, supra.*

C. & O. Ry. Co. v. *McDonald, supra.*

In conclusion, in support of our contention that no Federal question was specially set up, or claimed, we again call the court's attention to the fact that

the Federal Act in question applies only to railroads engaged in interstate commerce, where their employes are injured while also engaged in such commerce. The plaintiff in his declaration alleged that he and the defendant were engaged, at the time of the accident, in interstate commerce, but the defendant induced the court to hold that the proof offered was insufficient to sustain this allegation, and at its request the jury were instructed that neither the Federal Safety Appliance Act, as set forth in the second count, nor the Federal Employer's Liability Act, had any application to the case. (Rec., 379.) This being true, and since the plaintiff was denied all rights under the Act, we fail to see how the defendant, which, so far as this case is concerned, was not engaged in interstate commerce, can claim any rights thereunder, even if the Act be deemed to confer some such right upon railroad companies engaged in interstate commerce, and therefore, coming within the provisions of the Act.

Second.

Even if defendant's claim, as now made, had been specially set up, as a right, or immunity, under the Federal Act, it was not such, but was merely a question of general law relating to pleading and practice in a state court, and does not present a Federal question.

It is conceded by plaintiff that under the allegations of the declaration in this case, a cause of action under the Federal Liability Law was sufficiently pleaded to warrant a recovery; but we also claim that a common law cause of action was set up as

well, sufficient to warrant a recovery thereunder. In no count did the plaintiff expressly rely on, or mention any statute, except in the second count, where a violation of the Federal Safety Appliance Act was alleged to have concurred with the common law cause of action in causing the accident in question. (Rec., 8-10.)

Defendant's contention here will be that because the declaration warranted a recovery under the Federal Act, a recovery under the common law was not warranted, even where the proof failed to show the accident arose out of interstate commerce. But it seems clear that inasmuch as the declaration stated a common law cause of action, it might as well be argued that for that reason no recovery could be had under such declaration, under the Federal Act, had the interstate commerce allegations been proved. There is nothing in the Federal Act in question, or in any other Federal Act, that requires the state courts to hold that such a declaration insufficiently states a common law cause of action, or does not support a recovery at common law, where the proof as to interstate commerce fails. Such question is purely a question of general law on pleading and practice for the state courts and involves no Federal question.

Buena Vista Co. v. *Iowa Falls, etc., R. Co.*, 112 U. S., 156.

T. & N. O. R. Co. v. *Miller*, 221 U. S., 408 (416).

Railroad Co. v. *Butler*, 159 U. S., 87 (91).

L. I. W. S. Co. v. *Brooklyn*, 166 U. S., 685.

Johnson v. *Drew*, 171 U. S., 93.

Johnson v. *Risk*, 137 U. S., 300.
Iowa C. R. Co. v. *Iowa*, 160 U. S., 389.
Waters-Pierce Oil Co. v. *Texas, supra.*
W. U. Tel. Co. v. *Wilson*, 213 U. S., 52.
Oxley Stove Co. v. *Butler County*, 166 U. S., 648.

In *Brinkmeier* v. *Mo. Pac. R. Co.*, 224 U. S., 268, a somewhat similar question arose. There the plaintiff instituted suit in the state courts of Kansas to recover damages for personal injuries sustained while in the employ of the defendant. The negligence charged in the original petition was a violation of the original Safety Appliance Act, but the state courts held the petition did not state a cause of action. After the case had been twice tried, plaintiff asked to amend the petition by setting up a cause of action under such act, but permission was denied, and from a judgment against him sued out a writ of error in this court, where in the opinion it is said (p. 270):

"In 1908, after the case had been twice tried without any decisive result, the plaintiff sought to amend his petition by charging that the cars were used in moving interstate traffic, but the application was denied, the period of limitation having expired in the meantime. Error is assigned upon this ruling; but as *it involved only a question of pleading and practice under the laws of the state,* it is not subject to review by us."

Moreover, there is not such a radical difference between liability under the common law and liability under the Federal Act, as to render them wholly different causes of action to the extent that will be claimed by defendant. Negligence, for which re-

covery may be had under the Federal Act, is common law negligence, that is, negligence arising either out of the violation of duties imposed by the common law, or from the breach of duties imposed by statute or municipal ordinances, which, under the principles of the common law, would be actionable even aside from the Federal Act. All that the Federal Act affects is the extent, or measure, of liability for such negligence, leaving the questions of duty exactly as they were before the passage of the act. Consequently, in stating a case under the Federal Liability Law, unless some statute, state or Federal, be violated, common law duties, and their breach, that is, negligence, must necessarily be alleged as the basis of the right to recover, together with the additional allegation that the injury arose in interstate commerce. Many such acts of common law negligence, of course, would be sufficient to create a perfect case of common law liability, while others, such as the negligent acts of fellow-servants, would not. In the case at bar, however, the first and fourth counts state a good cause of action, either with or without the allegations as to interstate commerce. It results, therefore, that so far as a mere question of stating a cause of action is concerned, the Federal Liability Law has but little effect, and the negligence charged in a declaration may state a perfect cause of action under either the common law, or the Federal Act, or both. Now, if the proof shows that neither the plaintiff, nor defendant, were engaged in interstate commerce, at the time of the accident, so that the allegation as to interstate commerce must be eliminated as not proved, why, if there is sufficient

in the declaration and proof remaining to constitute a good cause of action at common law, should a plaintiff be denied his right of recovery?

This would in nowise impair the rule that where the accident did arise out of interstate commerce, that the Federal Act was the exclusive measure of liability. But such exclusiveness does not extend to the mere question of pleading. In cases, however, where the injury results in death, the right of recovery being purely statutory, the cause of action may, or may not, be different from that provided for by the state statute to such an extent as to be considered wholly different causes of action. Such might be the case in states where the right of action is given to the next of kin, instead of the personal representative, as by the Federal Act. But in causes of action, such as set up in the case at bar in the first and fourth counts, the causes of action are practically identical, whether considered as arising under the common law, or under the Federal Act. In either case the parties would be the same; the negligence the same, being purely common law; there would be the same measure of damages; the only difference being that under the Federal Act such defenses as contributory negligence and fellow-servants are eliminated.

In *Mo. K. & T. R. Co.* v. *Wolf*, 226 U. S., 570-578, suit was brought by the plaintiff in her individual capacity, to recover damages for the death of her son, which occurred in interstate commerce in the State of Kansas. The original petition was filed in the Federal Court on diversity of citizenship and alleged a cause of action under the statutes of Kansas.

More than two years after the death the defendant pleaded specially that the accident occurred in interstate commerce, and that the Federal Liability Law, and not the laws of Kansas, governed. At the same time plaintiff asked leave to amend her petition by being added as administratrix of the estate of her son as a party defendant, and asked leave to sue in both capacities, claiming a cause of action under either the Kansas, or Federal Acts, or both. Over defendant's objections, this amendment was allowed and a recovery was had under the Federal Liability Law. On appeal to this court it was claimed, among other things, that the amendment allowed, after the two years' limitation had expired, stated a *new cause of action* upon which recovery could not be had, but on this point this court (p. 576) said:

"Nor do we think it equivalent to the commencement of a new action, so as to render it subject to the two years' limitation prescribed by paragraph 6 of the Employers' Liability Act. The change was in *form rather than in substance. Stewart* v. *Baltimore & O. R. Co.*, 168 U. S., 445.) *It introduced no new or different cause of action*, nor did it set up any *different state of facts* as the ground of action, and therefore it related back to the beginning of the suit." (Citing numerous cases.)

The case of *St. L. I. M. & S. R. Co.* v. *McWhirter*, 229 U. S., 858, will, no doubt, be cited by the defendant as an authority holding, in effect, that the motion to direct a verdict was sufficient to raise the Federal question now here claimed by the defendant. But we think such is not the case. In the *McWhirter* case, the plaintiff and the defendant were both engaged in interstate commerce, and this fact

was not disputed. The petition contained allegations to that effect and expressly claimed a right of recovery under the Federal Employers' Liability Act, and also set up a violation of the Federal Hours of Service Act. A recovery was had by plaintiff and affirmed by the highest state court, and a writ of error was sued out to this court. In this court the plaintiff sought to sustain his judgment by urging that the state court found that the recovery was sustained on grounds of common law negligence, aside from the violation of the Federal Hours of Service Act. But this court held that such contention was not correct, saying:

"The contention wants foundation in fact. As we have seen, the pleadings in express terms exclusively base the right to relief upon the statutes of the United States, and *no non-Federal ground was either presented below or passed upon.*"

In as much as the only negligence upon which a recovery could have been had in such cause was the violation of the Hours of Service Act, this court held that it had jurisdiction to review the case; that there was no evidence tending to show that a violation of the Hours of Service Law contributed to the accident in question and reversed the judgment. But this was because the state court wrongfully interpreted and applied the Federal Act under which the recovery was had and not because of any ruling as to the common law or state practice.

The Appellate Court of Illinois, in passing upon and deciding this case, did not decide the question of the sufficiency of the declaration, as affected by any right that *accrued to the defendant under* the Fed-

eral Liability Law, but decided the question as a matter of general law relating to pleading and practice, and until the defendant brought the case to this court it, also, so treated the question. In other words, it was not claimed by the defendant heretofore that the Federal Act created the right, or immunity, here set up, as such, but that applying the general law of pleading and practice, it followed that such a declaration did not state a common law cause of action. And while the Appellate Court in deciding the question, and the defendant, in arguing the same heretofore, considered the Federal Act in question, yet it was not considered as creating a *right in defendant*, but was considered as any other Act of a similar nature would be considered, if set up in such a declaration, as affecting the question of whether such declaration sufficiently stated a common law cause of action, when the proof failed to bring the case within the Act set up.

In conclusion on this point, we insist that notwithstanding defendant's assignment of error in this court, the question is still one of general law relating to a mere question of pleading, which was never specially set up or claimed in the state courts, but that even if it were, it does not involve a Federal question, and the writ of error should therefore be dismissed.

THE DECISION OF THE STATE COURTS ON THE QUESTION OF PLEADING INVOLVED WAS CORRECT.

In the decision of the Appellate Court, on the question of pleading involved, it was held (Appendix, p. 48; 180 Ill. App., 518):

"We hold that the allegations in the first, second and fourth counts of the declaration, that the defendant was engaged and the plaintiff employed in interstate commerce, were not descriptive of any fact or condition essential to recover under the common law, if the other allegations of those counts were sustained, and that therefore they may be regarded as surplusage. *Chicago & G. T. R. Co.* v. *Spurney,* 197 Ill., 471."

That this is the well settled law and rule of practice in Illinois, we think will not be disputed.

In addition to the above, the following cases so hold:

Barnes v. *N. T. Co.,* 169 Ill., 118.

Ill. Steel Co. v. *Schymanowski,* 162 Ill., 447 (458).

N. Y., etc., R. Co. v. *Blumenthal,* 160 Ill., 40 (47).

Weber Wagon Co. v. *Kehl,* 139 Ill., 644.

C. C. Ry. Co. v. *O'Donnell,* 207 Ill., 478.

In the following cases it is held, in substance, that where a petition, or declaration, alleges that an accident arose in interstate commerce, but also states facts constituting a cause of action at common law, if the proof fails to show that the case did arise in interstate commerce, so as to come within the Federal Employer's Liability Act, yet recovery may be had at common law.

Jones v. *C. & O. R. Co.,* 149 Ky., 556; 149 S. W., 951.

Payne v. *N. Y., etc., R. Co.* (N. Y. Ct. of App.), 95 N. E., 20.

Acardo v. *N. Y., etc., T. Co.,* 116 App. Div., 793.

Paris, etc., R. Co. v. *Boston* (Tex. Civ. App.), 142 S. W., 947 (recently affi'd by U. S. Sup. Court).

Bennett v. *G. N. R. Co.*, 115 Minn., 128; 131 N. W., 1066.

So. Ry. Co. v. *Howerton* (Ind. App.), 101 N. E., 121.

Taylor v. *So. Ry. Co.* (Ind. App.), 101 N. E., 506.

Erie R. Co. v. *Kennedy*, 112 C. C. A., 76 (191 Fed., 332).

Ullrich v. *N. Y., etc., R. Co.* (D. C.), 193 Fed., 768.

Ahrens v. *C. M. & St. P. R. Co.* (Minn.), 141 N. W., 297.

Helm v. *Ry. Co.* (Ky.), 160 S. W., 945.

Atkinson, Rec., v. *Bullard, Admrx.* (Ga. App.), 80 S. E., 220.

In *Payne* v. *N. Y., etc., R. Co., supra*, the Court of Appeals, in its opinion, said:

"The learned Appellate Division of the Second Department has certified to us the following questions:

"1. 'In an action for damages for personal injuries by a servant against a master, is it proper for the plaintiff to plead in his complaint, as one cause of action, facts constituting negligence *under the common law*, facts constituting negligence *under the Employer's Liability Act of the State of New Jersey*, and facts constituting negligence *under the Act of Congress* known as the Federal Employer's Liability Act, *or any two of said grounds of liability?*' "

In answering this question in the affirmative, the Court, citing from the *Acardo* case, *supra*, which was a similar case, said:

"The plaintiff clearly has but one cause of action, and that for the damages he has sustained through

the *actionable negligence* of the defendants, if such negligence exists. Whether the facts bring his case within the Employer's Liability Act, or whether he must rely upon his common law rights, *must depend upon the evidence,* which he is able to produce upon the trial, and we can see no good reason for a refinement of the pleadings such as is directed by the order appealed from. If the plaintiff establishes his cause of action under the Employer's Liability Act, the common law allegations are mere surplusage, just as a portion of them would be if various common law grounds were asserted and only one of them proved."

In *Atkinson, Rec.,* v. *Bullard, Admrx., supra,* the suit was for the death of a train hand, and on the point in question it is said:

"It was not necessary for the plaintiff to affirmatively allege her right to recover *under any particular law,* either State or Federal. If her petition set forth facts which entitled her to recover *under any law* which the court had jurisdiction to apply, this was all that was necessary. *So. Ry. Co.* v. *Ansley,* 8 Ga. App., 325; 68 S. E., 1086."

In *Erie R. Co.* v. *Kennedy, supra,* suit was begun in the Federal Circuit Court for the Sixth Circuit, for an injury sustained by the plaintiff in Ohio. His petition described generally his right of action, but did not specifically rely upon either the Ohio Statute or the Federal Liability Act. In the defendant's plea, however, it was set up that the defendant was a common carrier by railroad and engaged in interstate commerce, and that plaintiff received the said injury while also engaged in such commerce. The case was submitted to the jury upon the theory that it arose under the Federal Law. A judgment was obtained by the plaintiff and was carried

by writ of error to the Circuit Court of Appeals. In the Court of Appeals the defendant insisted there could be no recovery for the reason that the petition must be treated as alleging only a common law liability under the Ohio Statute, while the testimony showed only a case arising under the Federal Statute; and that there was a variance between the petition and the proofs. The Court of Appeals, in its opinion, said:

"The act of the court in proceeding to submit the case to the jury on the theory that it was under the Federal Statute was equivalent to holding either that the petition was sufficient to support such a theory, or that the petition should *be treated as, in this respect, amended*, and that such amendment, being, so far as appeared to the court, a mere formality, did not require entry of record. * * * In substance defendant's position is that there was a variance between petition and proofs; but no such variance is material, unless it is of a character to *mislead the opposite party. Pa. Co.* v. *Whitney*, 95 C. C. A., 7. Here defendant was not misled, for the negligence of each party was in issue, under either theory, and the defendant had set up in its answer the claim that its liability, if any, was under the Federal Act. * * * Further, if we assume that an amendment of the petition was required in order to justify a submission under the Federal Statute, and that the action of the court was not equivalent to allowing an amendment, even then *no prejudice would result to defendant*, unless the rules of liability existing and given under the Federal Statute were *more burdensome to it* than those which existed under the Ohio Statute, and which, as defendant says, should therefore have been given."

So in the case at bar. If it were necessary, the declaration should be considered as having been amended by striking out the allegations as to inter-

state commerce, which could and, no doubt, would have been done had the question of variance been raised in the trial court. But even without such amendment being considered made, the action taken by the State Courts did not, and could not, have prejudiced the defendant's rights because the defenses of contributory negligence and fellow-servants were available under the common law, but not under the Federal Statute; in other respects defendant's rights were fully as great under the common law as under the Federal Act.

For the foregoing reasons, we think it evident that on the question involved, the decision of the Appellate Court of Illinois was correct.

After the Appellate Court refused to allow a writ of error, in this cause, it was allowed by one of the Justices of this court, and such fact has led to what we would, otherwise, deem undue length in this brief.

It is respectfully insisted by defendant in error that the writ of error herein should be dismissed and additional damages awarded, as for delay, etc.

Respectfully submitted.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

APPENDIX.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1913.

No. 843.

Wabash Railroad Company,
Plaintiff in Error,
vs.
John R. Hayes,
Defendant in Error.

To Messrs. J. L. Minnis, John M. Zane and Charles F. Morse, Attorneys for Plaintiff in Error:

YOU, AND EACH OF YOU, ARE HEREBY NOTIFIED, that on Monday, the 27th day of April, A. D. 1914, I shall make and present, before said Supreme Court of the United States, a motion on behalf of defendant in error to dismiss the writ of error, heretofore sued out from said court in said cause, on the ground that there is a want of jurisdiction in said Supreme Court of the United States, to hear and determine said cause; and that I shall file in support of said motion briefs, a copy of which is hereto attached; a copy of the above mentioned motion also is hereto attached.

Dated, Chicago, Illinois, March 31, 1914.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

Received a copy of the foregoing notice, brief and motion, this 4th day of April, A. D. 1914.

J. L. MINNIS,
JOHN M. ZANE,
CHARLES F. MORSE,
Attorneys for Plaintiff in Error.

IN THE

SUPREME COURT OF THE UNITED STATES.

October Term, A. D. 1913.

No. 843.

Wabash Railroad Company,
Plaintiff in Error,
vs.
John R. Hayes,
Defendant in Error.

MOTION TO DISMISS.

And now comes defendant in error, and shows to the court here that it is without jurisdiction to review this cause, and that the writ of error herein was sued out merely for delay, as will more fully appear from the brief in support of this motion, herewith filed.

WHEREFORE, defendant in error prays that the writ of error, in said cause, be dismissed for want of jurisdiction; and that additional damages be assessed and awarded defendant in error, as for delay, etc.

JAMES C. MCSHANE,
Attorney for Defendant in Error.

DECLARATION.

Record Page.

4 John R. Hayes, plaintiff, by James C. McShane, his attorney, complains of Wabash Railroad Company, defendant, of a plea of trespass on the case.

For that, whereas, the plaintiff alleges, that prior to and on, to-wit, the 9th day of July, A. D. 1908, the defendant, owned, possessed and operated a certain railroad which extended, among other places, from Chicago, Cook County, Illinois, into different states, and it was then and there a common carrier upon and in connection with its said railroad of commerce between the several states, and it then and there provided, and was possessed of and operated, in connection with and as a part of its said railroad at Chicago aforesaid a certain track which extended into and ended at a butting post inside of a certain grain elevator, and which track it used in the prosecution of its said business to run cars upon in putting them into and taking them out of said elevator, and plaintiff was then and there employed by the defendant in such commerce as a switchman to assist as its servant in the work of putting said cars into and taking them out of said elevator, and as such switchman, earned, to-wit, one hundred dollars per month, and by reason of the premises it was then and there

5 the duty of the defendant to exercise due care toward maintaining said track in a reasonably safe and proper condition for the purpose for which it was so provided and used. Yet, the plaintiff alleges, that

the defendant, not regarding its said duty, but in utter violation thereof, long prior to and then and there negligently permitted said track to become and remain in an unsafe and improper condition of repair for such use in this, that certain of the ties of said track were broken, rotten and decayed, and said track was uneven and otherwise in a dilapidated condition, and as a direct result and in consequence of the said unsafe and improper condition of said track, cars being run upon and over said track were liable and likely to become uncoupled, whereby the plaintiff and defendant's other servants, engaged in said work, were exposed to great danger of bodily injury, and all of which facts, the plaintiff alleges, the defendant knew, or by the exercise of due care in that behalf would have known a sufficient length of time prior to the injuries hereinafter complained of, to have enabled it by the exercise of ordinary care to have repaired said track, but that the plaintiff, through no want of ordinary care upon his part, did not know of the said condition of said track and of the dangers to which he was thereby exposed.

And the plaintiff further alleges, that at the time and place aforesaid, the defendant had in and while engaged in said interstate commerce a number of cars, to-wit, six cars coupled together and coupled to one of its switch engines, and by means of said switch engine, it was then and there shoving said cars upon and along said track and into said elevator. And the plaintiff, while he was employed in such commerce, and in the discharge of his duty was assisting in said work and was exercising ordinary care for his own safety, was riding between two of the

forward cars of said string of cars as they were being so pushed along said track and into said elevator; and plaintiff further alleges that as a direct result and in consequence of the said unsafe and improper condition of said track, two other cars of said string
6 of cars, which other cars were between the plaintiff and said engine, thereby then and there became uncoupled from each other, and the cars forward of the point where said cars so became uncoupled, including the cars between which plaintiff was as aforesaid, were thereby detached from said engine and the cars which remained coupled together and to said engine, and they could not be controlled or stopped by said engine, as they were to be and would have been if said cars had not become uncoupled as aforesaid, and as a direct result and in consequence thereof, said forward cars then and there unavoidably ran upon and along said track and into said elevator and against said butting post at a high rate of speed, and they were then and there wrecked when they struck and by striking said butting post.

And the plaintiff further alleges, that when he learned that said cars had became uncoupled, as aforesaid, the cars between which he was riding as aforesaid were then and there running upon and along said track inside of said elevator, and were closely approaching said butting post, and he then and there believed and was justified in believing that said cars would run against said butting post with great force and violence, and that if he remained between said cars until they struck said butting post, he was liable and likely to be thereby severely injured or killed, and in order to avoid such injuries

or death, he thereby then and there attempted to get from between said cars, and while he was doing so, and while, as he alleges, he was in all respects exercising ordinary care for his own safety, he was then and there knocked down and from between said cars by an obstruction alongside of said track, and he thereby then and there fell upon said track, and one or more of the wheels of one of said cars thereby then and there ran over one of his arms, and his arm was thereby then and there so crushed and mangled, that it became necessary to amputate it, and it was shortly afterwards amputated, and divers other bones, ligaments, tendons and membranes of his body were also thereby then and there sprained, dislocated, broken and otherwise injured, and he was cut, bruised and wounded about his head, face, limbs and
7 body, and sustained serious injuries to divers of his internal organs and a serious shock and injury to his spine and nervous system, and as a direct result of his said injuries, he has ever since suffered and will continue permanently to suffer great pain, and he has become and is permanently disfigured, crippled, sick, sore, disordered and incapacitated from attending to or transacting his regular business, or any ordinary business or affairs, and he has thereby been and will continue permanently to be deprived of large earnings which he might and otherwise would have made and acquired, and he has been compelled to, and did incur, expend and lay out, and will continue to be required to incur, expend and lay out for medical attention, nursing, medicines and otherwise, divers large sums of money, amounting to, to-wit, five hundred dollars in and about endeavoring to be

cured of his said injuries, sickness and disorders, occasioned as aforesaid.

8 SECOND COUNT.

For that, whereas, the plaintiff alleges, that prior to and on, to-wit, the 9th day of July, A. D. 1908, the defendant owned, possessed and operated a certain standard gauge railroad which extended, among other places, from Chicago, Cook County, Illinois, into different states, and it was then and there a common carrier upon and in connection with its said railroad of commerce between the several states, and it then and there provided and was possessed of and operated in connection with and as a part of its said railroad, at Chicago, aforesaid, a certain track which extended into and ended at a butting post inside of a certain grain elevator, and which track it used in the prosecution of its said business, to run cars upon in putting them into and taking them out of said elevator, and plaintiff was then and there employed by the defendant in such commerce as a switchman to assist as its servant in the work of putting said cars into and taking them out of said elevator, and as such switchman earned, to-wit, one hundred dollars per month, and by reason of the premises, it was then and there the duty of the defendant to exercise due care toward maintaining said track in a reasonably safe and proper condition for the purpose for which it was so provided and used. Yet the plaintiff alleges, that the defendant, not regarding its said duty but in utter violation thereof, long prior to and then and there, negligently permitted said
9 track to become and remain in an unsafe and im-

proper condition of repair for such use, in this, that certain of the ties of said track were broken, rotten and decayed, and said track was uneven, and otherwise in a dilapidated condition, and as a direct result and in consequence of the said unsafe and improper condition of said track, cars being run upon and over said track were liable and likely to become uncoupled, whereby the plaintiff and defendant's other servants, engaged in said work, were exposed to great danger of bodily injury, and all of which facts, the plaintiff alleges, the defendant knew, or by the exercise of due care in that behalf would have known a sufficient length of time prior to the injuries hereinafter complained of, to have enabled it, by the exercise of ordinary care to have repaired said track; but that the plaintiff, through no want of ordinary care upon his part, did not know of the said condition of said track and of the dangers to which he was thereby exposed.

10 And the plaintiff further alleges that at the time and place aforesaid, the defendant had, in and while engaging in said interstate commerce, a number of cars, to-wit, six box cars, coupled together and coupled to one of its switch engines, and by means of which switch engine it was then shoving said cars upon and along said track and into said elevator. And the plaintiff further alleges that there were two cars, one a loaded car, and the other an empty car, which were coupled together and were located and placed in said string of cars, between where plaintiff was, as hereinafter described, and said engine. And plaintiff further alleges that the American Railway Association, prior to July 1, 1904,

under and by virtue of the power conferred upon it by a certain Act of Congress, designated to the Interstate Commerce Commission the standard height of drawbars for freight cars, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars, for each of the several gauges of railroads in use in the United States, and fixed a maximum variation from such standard height to be allowed between the drawbars of empty and loaded cars, and which said standard height of drawbars so fixed for standard gauged railroads in the United States, was and is forty-four inches, and the maximum variation, so fixed from said standard height, to be allowed between drawbars of empty and loaded cars, was and is three inches, and in compliance with said Act of Congress said American Railway Association duly certified to the Interstate Commerce Commission the said standard and variation allowed between drawbars of empty and loaded cars, and the said Interstate Commerce Commission, within the time fixed by said Act of Congress, duly promulgated such standard and variation, and gave notice of such standard and variation to all common carriers in the United States, including the defendant, and by means of the premises it was made unlawful for any common carrier to use in interstate traffic any cars, loaded or unloaded, which did not
11 comply with the standard and variation above provided for. But the plaintiff alleges that the defendant then and there unlawfully and negligently hauled and used in moving interstate commerce the said loaded and empty cars which were coupled together, as aforesaid, when and while the drawbars, or

couplers, of said cars did not comply with said standard, but upon the contrary, when and while there was more than three inches variation in the height of said drawbars or couplers, measured perpendicularly from the level of the tops of the rails to the centers of the drawbars of said cars.

And the plaintiff further alleges that at the time and place aforesaid, while he was employed in such commerce, and in the discharge of his duty was assisting in said work and was exercising ordinary care for his own safety, he was riding between two of the forward cars of said string of cars as such string of cars was so being pushed upon and along said track and into said elevator, and he further alleges, that as a direct result and in consequence of the said unsafe and improper condition of the said track, and of there being more than three inches variation, measured as aforesaid, between the height of the drawbars, by which said loaded and empty cars were coupled together, as aforesaid, said loaded and empty cars thereby then and there became uncoupled from each other, and the cars forward of the point where said cars became so uncoupled, including the cars between which plaintiff was, as aforesaid, were thereby detached from said engine, and the cars which remained coupled together and to said engine, and they could not be controlled or stopped by said engine as they were to be and would have been if said cars had not become so uncoupled, as aforesaid, and as a direct result and in consequence thereof, said forward cars unavoidably ran upon and along said track and into said elevator and against said
12 butting post at a high rate of speed, and were then

and there wrecked when they struck and by striking against said butting post.

And the plaintiff further alleges that he did not learn that said cars had become so uncoupled until the cars between which he was riding were running inside of said elevator and were near said butting post, and he then believed and was justified in believing that said cars would run against said butting post and that if he should remain between said cars until they struck said butting post, he was liable and likely to be thereby seriously injured, or killed, and in order to avoid such injury, or death, he then and there attempted to get from between said cars, and while doing so, and while, as he alleges, he was in all respects exercising ordinary care and caution for his own safety, he was thereby then and there knocked down and from between said cars by an obstruction alongside of said track, and he thereby then and there fell upon said track, and one or more of the wheels of one of said cars thereby then and there passed over one of his arms, and his said arm was thereby then and there so crushed and mangled, that it became necessary to amputate it, and it was shortly afterwards so amputated, and by means of the premises, the plaintiff sustained and incurred the injuries, disabilities, loss, damages, pain, suffering and obligations described and set forth in the first count of this declaration, to which count, for a description of the same, he here refers.

13 THIRD COUNT.

For that, whereas, the plaintiff alleges, that prior to and on, to-wit, the 9th day of July, A. D. 1908, the

defendant owned, possessed and operated a certain railroad which extended, among other places, from Chicago, Cook County, Illinois, into different states, and it was then and there a common carrier upon and in connection with its said railroad of commerce between the several states, and it then and there provided and was possessed of and operated in connection with and as a part of its said railroad, at Chicago, aforesaid, a certain track which extended into and ended at a butting post inside of a certain grain elevator, and which track it used in the prosecution of its said business, to run cars upon in putting them into and taking them out of said elevator, and plaintiff was then and there employed by the defendant in such commerce as a switchman to assist as its servant in the work of putting said cars into and taking them out of said elevator, and as such switchman earned, to-wit, one hundred dollars per month, and by reason of the premises, it was then and there the duty of the defendant to exercise due care toward maintaining said track in a reasonably safe and proper condition for the purpose for which it was so provided and used. Yet the plaintiff alleges, that the defendant, not regarding its said duty but in utter violation thereof, long prior to and then and there, negligently permitted said track to become and remain in an unsafe and improper condition of repair
14 for such use, in this, that certain of the ties of said track were broken, rotten and decayed, and said track was uneven, and otherwise in a dilapidated condition, and as a direct result and in consequence of the said unsafe and improper condition of said track, cars being run upon and over said track were liable

and likely to become uncoupled, whereby the plaintiff and defendant's other servants, engaged in said work, were exposed to great danger of bodily injury, and all of which facts, the plaintiff alleges, the defendant knew, or by the exercise of due care in that behalf would have known a sufficient length of time prior to the injuries hereinafter complained of, to have enabled it, by the exercise of ordinary care to have repaired said track; but that the plaintiff, through no want of ordinary care upon his part, did not know of the said condition of said track and of the dangers to which he was thereby exposed.

And the plaintiff further alleges, that at the time and place aforesaid, the defendant had, in and while engaged in said interstate commerce, a number of cars, to-wit, six cars coupled together and coupled to one of its switch engines, and which switch engine was then and there under the management and control of a certain engineer, employed by the defendant as its servant in that behalf, and by means of said switch engine, defendant was then and there shoving said cars upon and along said track and into said elevator; and the plaintiff, while he was employed in such commerce, and in the discharge of his duty was assisting in said work, and was exercising ordinary care for his own safety, was riding between two of the forward cars of said string of cars, as they were so being pushed upon and along said track and into said elevator; and plaintiff further alleges that defendant's said engineer, by means of said engine, then and there wrongfully and negligently pushed and ran said cars upon and along said track at an unusually high and dangerous rate of speed, and as

a direct result and in consequence thereof, and of the said unsafe and improper condition of said track, two other cars of said string of cars, which other cars were between the plaintiff and said engine, thereby then and there became uncoupled from each other, and the cars forward of the point where said cars so became uncoupled, including the cars between which plaintiff was, as aforesaid, were thereby detached from said engine and the cars which remained coupled together and to said engine, and the said cars, so detached, could not be controlled or stopped by said engine, as they were to be and would have been if said cars had been run at a proper rate of speed and had not become uncoupled, as aforesaid.

16 And as a direct result and in consequence of said cars becoming so uncoupled, and of their being pushed and run at such unusually high and dangerous rate of speed, said forward cars then and there ran upon and along said track and into said elevator and against said butting post at an unusually high and dangerous rate of speed, and they were thereby then and there wrecked when they struck and by striking said butting post.

And the plaintiff further alleges, that when he learned that said cars had become uncoupled, as aforesaid, the cars between which he was riding, as aforesaid, were then and there running upon and along said track inside of said elevator, and were closely approaching said butting post, and he then and there believed, and was justified in believing that said cars would run against said butting post with great force and violence, and that if he remained between said cars until they struck said butting post,

he was liable and likely to be thereby severely injured or killed, and in order to avoid such injuries or death, he thereby then and there attempted to get from between said cars, and while he was doing so, and while, as he alleges, he was in all respects exercising ordinary care for his own safety, he was then and there knocked down and from between said cars by an obstruction alongside of said track, and he thereby then and there fell upon said track, and one or more of the wheels of one of said cars thereby then and there ran over one of his arms, and his arm was thereby then and there so crushed and mangled, that it became necessary to amputate it, and it was shortly afterwards amputated, and by means of the premises, the plaintiff sustained and incurred the injuries, disabilities, loss, damages, pain, suffering, and obligations, described and set forth in the first count of this declaration, and to which said count, for a description of the same, he here refers.

17 FOURTH COUNT.

And for that, whereas, the plaintiff alleges, that prior to and on, to-wit, the 9th day of July, A. D. 1908, the defendant owned, possessed and operated a certain railroad which extended, among other places, from Chicago, Cook County, Illinois, into different states, and it was then and there a common carrier upon and in connection with its said railroad of commerce between the several states, and it then and there provided and was possessed of and operated in connection with and as a part of its said railroad, at Chicago, aforesaid, a certain track which extended into and ended at a butting post inside of

a certain grain elevator, and the plaintiff was then and there employed by the defendant in such commerce as a switchman to assist as its servant in the work of putting said cars into and taking them out of said elevator, and as such switchman earned, to-wit, one hundred dollars per month.

And the plaintiff further alleges that at the time and place aforesaid, the defendant had, in and while engaging in said interstate commerce, to-wit, six box cars coupled together and coupled to one of its switch engines, and by means of which engine it was then and there shoving said cars upon and along said track and into said elevator.

And the plaintiff further alleges that the brake appliances with which one of said cars was equipped for the purpose of setting the brake and thereby stopping said car, was then and there in such a defective and inoperative condition that said brake could not be set. And the plaintiff alleges that the defendant knew, or by the exercise of due care in that behalf would have known of the said condition of said brake appliances a sufficient time prior to the injuries hereinafter complained of, to have enabled it, by the exercise of ordinary care in that regard, to have repaired the same, but that the plaintiff, through no want of ordinary care upon his part, did not learn of the said condition of said brake appliances in time to avoid the injuries hereinafter complained of.

18 And the plaintiff further alleges that at the time aforesaid, while he was employed in such commerce, and in the discharge of his duty to the defendant was assisting in said work and was exercising ordinary

care for his own safety, he was riding on top of one of the forward cars of said string of cars, as they were so being run upon and along said track towards said elevator, and he then and there attempted to set the brake on said car that had the defective brake appliances aforesaid, in order to check the speed of and to stop said car, as was necessary to the safe performance of said work, but as a direct result and in consequence of the said defective and inoperative condition of said brake, he was unable to set said brake, or to check the speed of or stop said cars, and at the time when he thus discovered the said brake appliances were defective and inoperative, as aforesaid, said car, upon which he was then riding, was closely approaching the door of said elevator, and the plaintiff, in order to avoid being struck by said door, necessarily climbed down between two of the forward cars of said string of cars, and while he was so riding between said cars and after said cars had entered and were running in said elevator and were closely approaching said butting post, he learned that the forward cars of said train had accidentally become uncoupled from said engine, and he then knew that as the brake was not set upon said car upon which he attempted to set it as aforesaid said cars were liable and likely to run against said butting post at a high rate of speed, as they did in fact afterwards run, and he then believed and was justified in believing that if he remained between said cars until they should strike said butting post, that he was liable and likely to be thereby seriously injured or killed, and in order to avoid such danger or death, he then and there attempted to get from

between said cars, and while so attempting, and while, as he alleges, he was in all respects exercising ordinary care for his own safety, he was thereby then and there struck by an obstruction alongside of said
19 track, and was thereby then and there knocked from between said cars and down onto said track, and one or more of the wheels of one of said cars thereby then and there ran over one of his arms, and his arm was thereby then and there so crushed and mangled, that it became necessary to amputate his said arm, and it was shortly afterwards so amputated, and by means of the premises the plaintiff sustained and incurred the injuries, disabilities, loss, damages, pain, suffering and obligations described and set forth in the first count of this declaration, and to which said count, for a description of the same, he here refers.

To the damage of the plaintiff of $20,000; wherefore he brings this suit.

JAMES C. MCSHANE,
Attorney for Plaintiff.

PLEA.

20 And now comes the defendant, the Wabash Railroad Company, by Shope, Zane, Busby & Weber, its attorneys, and defends the wrong and injury, when, etc., and says that it is not guilty of the said supposed grievances above laid to its charge, or any or either of them, as plaintiff has thereabove complained, and of this it puts itself upon the country.

SHOPE, ZANE, BUSBY & WEBER.

* * * * * * * *

JUDGMENT AND EXCEPTIONS.

26 This day again come the parties to this suit by their attorneys respectively and thereupon the plaintiff remits the sum of four thousand dollars from the amount of damages rendered by the jury aforesaid and asks for judgment upon the balance of said verdict, being the sum of fourteen thousand dollars.

And said cause coming on now to be heard upon the defendant's motion, heretofore entered herein, for a new trial in said cause after arguments of counsel and due deliberation by the court and in consideration of said remittitur aforesaid, said motion is overruled and a new trial denied, to which the defendant excepts.

Whereupon, the defendant enters herein its motion in arrest of judgment, which motion is also overruled, to which the defendant excepts.

Therefore, it is considered by the court that the plaintiff do have and recover of and from the defendant the said sum of fourteen thousand dollars, together with his costs and charges in this behalf expended and have execution therefor, to which the defendant excepts.

Whereupon, the defendant having entered its exceptions herein, prays an appeal from the judgment of this court to the Appellate Court in and for the First District of Illinois, which is allowed upon filing its appeal bond herein in the sum of sixteen thousand dollars, to be approved by the court within thirty days from this date and leave given the defendant to file its bill of exceptions herein within sixty days from this date.

* * * * * * * *

187 MOTION TO DIRECT VERDICT AT END OF PLAINTIFF'S CASE AND RULING.

And thereupon, at the close of the plaintiff's case, the defendant moved the court in writing, to take the case from the jury, and to instruct the jury to find the defendant not guilty, which motion is accompanied by a written instruction to the same effect.

Said motion and said instruction are in the words and figures following, to-wit:

Now comes the defendant and at the close of plaintiff's evidence asks the court on the ground of a variance between the proof and the declaration, the proof showing that the injury was caused by the plaintiff's head being struck by a pillar standing close to the track, and not by any act of negligence alleged in the declaration, to give to the jury the following instruction: The court instructs the jury to find the defendant not guilty.

SHOPE, ZANE, BUSBY & WEBER,
Attorneys for Defendant.

188 We, the jury, find the defendant not guilty.

But the court overruled said motion and refused to give said instruction; to which action of the court in overruling said motion and refusing to give said instruction, the defendant, by its counsel, then and there duly excepted.

* * * * * * * *

335 MOTION TO DIRECT VERDICT AT END OF WHOLE CASE, RULING AND EXCEPTION.

Now comes the defendant and requests the court, at the close of the evidence and before the cause is

submitted to the jury, to give to the jury the following instruction:

"The court instructs the jury to find the defendant not guilty."

SHOPE, ZANE, BUSBY & WEBER,
Attorneys for Defendant.

336 We, the jury, find the defendant not guilty.

337 But the court denied said motion, and refused to give said instruction.

To which action of the court in denying said motion and in refusing to give said instruction the defendant, by its counsel, then and there duly excepted.

* * * * * * * *

DEFENDANT'S REFUSED INSTRUCTIONS.

359 And before the argument (and at the same time it tendered to the court and requested the court to give the instructions which the court gave at defendant's request as hereafter set forth) the defendant requested the court separately to give to the jury the following separate written instructions:

360 1. The court instructs the jury that the plaintiff does not make out a case against the defendant by proving the mere happening of the injury to plaintiff while engaged in the employment of the defendant and while working upon a train of cars operated by the defendant. Before the plaintiff can recover he must prove by the preponderance of the evidence not only that he was at the time of and just prior to the happening of the injury, in the exercise of due care for his own safety, but he must also prove by the preponderance of the evidence that the defendant was

guilty of some specific act of negligence which is charged in the declaration. And it does not devolve upon the defendant to show that it was not guilty of some specific negligence charged against it, but the rule is that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence that the defendant was guilty of such negligence, and unless the plaintiff proves these matters by a preponderance of the evidence, he cannot recover and the jury should find the defendant not guilty.

Refused; already given.

361 12. You are further instructed that the burden of proof is not upon the defendant to show that the plaintiff at the time of and before the happening of the injury in question, was not exercising ordinary care and prudence for his own safety, but the burden is upon the plaintiff to prove by a preponderance of the evidence that at the time of and before the happening of his injury, he was exercising ordinary care and prudence for his own safety, and this rule as to the burden of proof is binding in law, and must govern the jury in deciding this case.

Refused; already given.

362 14. The court instructs the jury that if they believe from the evidence that while the cars here in question were being pushed towards the elevator in question, if they were being so pushed; and if the jury believe from the evidence that the plaintiff was riding on the top of one of such cars, and if the jury further believe from the evidence that the riding of plaintiff upon said car, if he was so riding, was a failure on his part to exercise ordinary care and

prudence for his own safety, and that such want of ordinary care and prudence, if there was such, was so connected with the injury of plaintiff, that but for it the injury would not have been sustained, then the jury should find the defendant not guilty.

Refused; already given.

363 15. The court instructs the jury that if they believe from the evidence that while the cars here in question were being pushed towards the elevator in question, if they were being so pushed, and if the jury further believe from the evidence that the plaintiff was or got down between two of such cars, and if the jury further believe from the evidence that such act of the plaintiff, if he did so act, was a failure on his part to exercise ordinary care and prudence for his own safety, and that such want of ordinary care and prudence, if there was such, proximately contributed to the injury of plaintiff, then the jury should find the defendant not guilty.

Refused; already given.

364 But the court marked each and every of said requests "Refused—Already given," and refused to give each and every of them to the jury, and to the refusal of the court to give each separate request, the defendant then and there severally and separately excepted.

PLAINTIFF'S GIVEN INSTRUCTIONS.

365 Thereupon the court upon motion of the plaintiff gave to the jury in writing the first four instructions following, to the giving of which the defendant then and there severally excepted:

366 1. The jury are instructed that the plaintiff is not bound to prove his case beyond a reasonable doubt,

but is merely bound to prove it by a preponderance of the evidence. *Given.*

367 2. The court instructs the jury that if you believe from the evidence that any witness has wilfully and knowingly sworn falsely on this trial to any matter or thing material to the issues in the case, then the jury are at liberty to disregard his or her entire testimony except in so far, if at all, as it may have been corroborated by other credible evidence, or by facts and circumstances proved on the trial. *Given.*

368 3. If, under the evidence and instructions of the court the jury find the defendant guilty, then in estimating the plaintiff's damages, if any, it will be proper for the jury to consider the effect, if any, of the injury in the past, and in the future, upon the plaintiff, the use of his arm and his ability to attend to his affairs generally, in pursuing any ordinary calling, in so far, if at all, as the evidence shows that these have been affected in the past and will be affected in the future; and also the bodily pain and suffering, if any, he sustained, or will sustain, as a direct result of said injury, in so far, if at all, as it has been shown by the evidence; and any and all damages in so far, if at all, as they are alleged in the declaration and shown by the proof to be the necessary and direct result of the injury complained of. *Given.*

369 4. The court instructs the jury that neither by these instructions nor by any words uttered or remarks made by the court during this trial, does or did the court intimate or mean to give, or wish to be understood as giving, an opinion as to what the

proof is or what it is not, or what the facts are in this case or what are not the facts herein. It is for the jury to find and determine the facts and this they must do from the evidence, under the law, and, having done so, then apply to them the law as stated in these instructions. The instructions given to the jury are and constitute one connected body and series and should be so regarded and treated by the jury; that is to say, they should apply them to the facts as a whole, and not detached or separated, any one instruction from any or either of the others. *Given.*

DEFENDANT'S GIVEN INSTRUCTIONS.

370 Thereupon the court gave to the jury the following written instructions upon request of the defendant:

371 16. The court instructs the jury that although they should find from a preponderance of the evidence that the defendant was guilty of some specific negligence charged in the declaration, nevertheless, if the jury believe from the evidence that the plaintiff was guilty of contributory negligence at and before this injury here sued for, or if the jury believe from the evidence that the plaintiff failed to exercise at and before his injury, ordinary care and prudence for his own safety, if he did so fail, then the jury should find the defendant not guilty. *Given.*

372 13. The court instructs the jury that one of the defenses relied on by the defendant in this case is that of contributory negligence. The term contributory negligence is used in law to designate such conduct on the part of the plaintiff as prevents a recovery in an action for injuries to himself. Contributory negligence as applied to this case means a fail-

ure to exercise ordinary care for his own safety on the part of the plaintiff, which proximately contributed to bring about the injury which he sues for. The term proximately, as used in this definition, means closely connected with the injury in the order of events, and so connected with the injury that but for the contributory negligence the injury would not have been sustained. If the jury believe from the evidence that the plaintiff was guilty of contributory negligence as herein defined, then the jury should find the defendant not guilty. *Given.*

373 19. If you believe from the evidence that the plaintiff and the servants of the defendant, or some of them, were both guilty of negligence proximately contributing to the injury, then you are instructed that you have no right to compare the negligence of the plaintiff with that of the servants of the defendant or of the defendant and find a verdict according to which side you think was guilty of the greater negligence, for in such case it is the law that it makes no difference which was guilty of the greater negligence, but under such circumstances the plaintiff cannot recover and your verdict should be not guilty. *Given.*

374 11. The court instructs the jury that the plaintiff at and before the happening of his injury was bound to the exercise of ordinary care and prudence for his own safety, and that if he failed to exercise such ordinary care and prudence at such time, he cannot recover; that by ordinary care and prudence is meant such care and prudence as a man of ordinary prudence bestows upon his own affairs and concerns,

and the prudence and vigilance which reason and law requires a man to exercise for his own safety must be proportionate to the danger, if any, surrounding such man, at the time, and exercised with reference to the situation and position in which such man finds himself, and it devolves upon the plaintiff to prove by the greater weight of the evidence that his conduct, at and before the time of his injury, amounted to the exercise of ordinary care.

Given.

375 8. The court instructs the jury that the defendant was required to exercise only reasonable care and prudence with reference to the condition of its track under the circumstances as shown by the evidence and in judging of the defendant's care and prudence in regard to the condition of such track, the jury should take into consideration the fact, if it be a fact, that such track was a switch track into an elevator used for the purpose of switching cars into the elevator, and not a track used for the passage of trains, and the jury should further take into consideration the facts as shown by the evidence as to how and for what purpose the track was used. *Given.*

376 21. If the jury believe from the evidence that the plaintiff and the defendant were both negligent and that the negligence of both contributed directly to cause the injury in this case, then the jury should find for the defendant. *Given.*

377 5. The court instructs the jury that as to the negligence of the defendant charged in the declaration regarding the condition of the track, and regarding the condition of the handbrake upon a certain car

in the train, with which plaintiff was working, the rule of law as to assumption of risk by the plaintiff applies, if there was any such assumption of risk, under the instructions thereto as the court will hereinafter, in these instructions, instruct you.

Given.

378 6. The court instructs the jury that an employe when he engages in an employment assumes the natural and ordinary risks, incident to the performance of such service, or which would become apparent to such employe by ordinary observation or which are readily discernible by a person in the exercise of ordinary care, or where his means of knowledge are equally as great as those of his employer. And if you believe from a preponderance of the evidence that the injury to the plaintiff was the result of one of the ordinary risks and perils incident to the performance of his service as he was then performing it, and that such risk and peril, if any, were known to the plaintiff or could have been known to him by the exercise of ordinary care on his part, then he cannot recover and you should find the defendant not guilty.

Given.

379 4. The court instructs the jury that the evidence is insufficient to show that the train of cars or any of them upon which the plaintiff was working at the time of his injury was engaged in interstate traffic, and therefore the jury should disregard any negligence charged in the declaration with regard to said cars not being properly equipped under the Federal Safety Appliance Act, and should also disregard any

claim of plaintiff's counsel that the Federal Employers' Liability Act has any application to this case.

Given.

380 3. The jury are instructed that the plaintiff cannot recover in this case against the defendant, unless the jury unanimously believe that the plaintiff has proved by a preponderance of the evidence the following propositions:

1. That the alleged injury of plaintiff was not brought about or proximately contributed to by any failure on his part to exercise ordinary care for his own safety at and just prior to the time of the accident in question.

2. That the defendant company was guilty of the negligence charged by plaintiff.

3. That such negligence, if any be proved by a preponderance of the evidence, was the proximate, direct cause of the plaintiff's alleged injury.

And if the jury find from the evidence that the plaintiff has failed to prove by a preponderance of the evidence these propositions as stated, or that he has failed so to prove any one of them, the jury should find the defendant not guilty. *Given.*

381 2. The court instructs the jury that the burden of proof is upon the plaintiff to prove by the greater weight of the evidence that the defendant is guilty of some specific negligence charged by the plaintiff in his declaration, and this rule as to burden of proof is binding in law, and must govern the jury in deciding this case. The jury have no right to disregard said rule or to adopt any other in lieu thereof, but in weighing the evidence and coming to a verdict,

the jury should apply said rule and adhere strictly to it, the same as to every rule of law laid down in these instructions. *Given.*

382 10. The court instructs the jury that all the members of the switching crew in which plaintiff was working at the time of his injury were fellow-servants, and, therefore, if the jury believe from a preponderance of the evidence that the cars were backed toward the elevator at too high a rate of speed by the engineer of the switching crew and that the injury to plaintiff was caused wholly by said too high rate of speed, they should find the defendant not guilty. *Given.*

383 9. If the jury believe from a preponderance of the evidence that the injury to plaintiff was caused wholly by the want of reasonable care on the part of some other member of the switching crew, at or just prior to the happening of the injury to plaintiff, they should find the defendant not guilty. *Given.*

20. The court charges the jury that if they believe from the evidence that orders had been given by the superintendent of the defendant, not to ride cars into the elevator, and if the jury further believe from the evidence that prior to plaintiff's injury such orders were communicated to him, and if the jury further believe from the evidence that the plaintiff at the time of his injury was riding the cars into the elevator, then the plaintiff would not be excused for violating said order, if he did violate it, by reason of the fact that theretofore he or other switchmen had customarily ridden cars into the elevator, if such be the fact, unless the jury further find from the evi-

dence that such violation of the order, if there was such order, was known to some officer of the defendant higher in authority than the different members of the switching crew. *Given.*

384 7. The court instructs the jury that if they believe from the evidence that the plaintiff knew the hazards of his employment, if there were any such hazards, arising from the condition of the track upon which the train of cars with which plaintiff was working was being switched, he cannot maintain an action against the defendant for the injury simply upon the ground that the track might have been made safer. *Given.*

385 17. The court instructs the jury that if they believe from the evidence that the injury to plaintiff happened as an accident without negligence either on his part or on the part of the defendant, the jury should find the defendant not guilty. *Given.*

386 18. The court instructs the jury that the question of damages is an entirely distinct and different question from the question of liability, and in determining the question of liability, you should not permit the character of plaintiff's alleged injury, or the amount of his alleged damages, to influence you in any degree. If there is no liability on the part of the defendant, you will not have occasion to consider at all the character or extent of the plaintiff's alleged injury. *Given.*

387 22. The court instructs the jury that while they are the judges of the credibility of the witnesses, they have no right to disregard the testimony of an unimpeached witness sworn on behalf of the defend-

ant, simply because such witness was or is an employe of the defendant, but it is the duty of the jury to receive the testimony of such witness in the light of all the evidence, the same as they would receive the testimony of any other witness, and to determine the credibility of such employee by the same principles and tests by which they determine the credibility of any other witness. *Given.*

388 23. You are instructed that the declaration is merely the unsworn statement of what the plaintiff alleges, and it neither proves nor tends to prove any allegations contained in it. In weighing and considering the evidence and in deciding the case, you are not to consider the declaration, or any statements in it, as any evidence whatever of the truthfulness of the statements therein. *Given.*

389 24. The court instructs the jury that it is their duty to try this case and consider the defendant in all matters pertaining to this trial as though it were a natural person instead of a railway corporation. Railway corporations are entitled to the same fair and unprejudiced treatment in courts of law as individuals are under like circumstances, and the fact that the plaintiff is an individual and the defendant is a railway company must make no difference with you, nor should any sentiment or prejudice, or feeling or sympathy, have any weight with you in deciding this case. It is your duty to hear and consider the evidence with the same fairness and impartiality, and arrive at the same verdict as you would if the contest were between two individuals.

In considering and deciding this case it is the duty

of the jury to look solely to the evidence for the facts and to the instructions of the court for the law of this case, and find their verdict accordingly, without reference to who is plaintiff or who is defendant. All evidence stricken out by the court must be entirely disregarded by you. The instructions given you in this case are the instructions of the court and the law of the case which must govern you. *Given.*

390 26. The jury are instructed that the fact that the court has given instructions on the subject of the plaintiff's damages, or that the defendant's counsel have discussed such subject, is not to be taken by the jury as any intimation by the court, or any admission by the said defendant, of the defendant's liability for the injury complained of. It would be wholly unwarrantable to consider these facts or either of them as implying or intimating that the defendant is or is not liable for any injury to the plaintiff. *Given.*

391 27. You should not in your deliberations as to your verdict, reach a verdict by any compromise between the question of liability and the amount of the damages, and none of you should consent to a verdict which does not meet with the approval of your own judgment and conscience after due deliberation with your fellow jurors and after fairly considering all the evidence admitted by the court, and the law as given in the instructions of the court. *Given.*

392 25. The court instructs the jury that if under the evidence and the instructions of the court, the jury find the defendant is liable for plaintiff's injury,

then the plaintiff is entitled to recover only fair and just compensation for the injury, if any, which he sustained in the accident in question, as shown by the evidence. Beyond that you must not go, and in determining what is a fair and just compensation you must determine that question as though this suit were between two individuals. The fact that the defendant is a railway company must not influence you in the slightest degree in determining that question. This, with all other rules of law laid down in these instructions you are bound strictly to observe under the oath which you have taken and under the sworn answers heretofore given by you and upon the faith of which you were elected to serve as jurors in this case.

To the giving of the foregoing instructions, and each one thereof, so given on behalf of the defendant, plaintiff by his counsel then and there duly excepted.

VERDICT.

393 Thereupon the jury retired to consider of their verdict and afterwards returned into court, and say they find the defendant guilty and assess damages for the plaintiff in the sum of eighteen thousand dollars, whereupon the defendant excepted to said verdict and then and there moved for a new trial and filed the same in writing as follows:

394 MOTION FOR A NEW TRIAL.

The defendant, Wabash Railroad Company, by Shope, Zane, Busby & Weber, its attorneys, now comes and moves the court to set aside the verdict

and to grant a new trial herein for the following causes:

1. The court erred in admitting over defendant's objection improper evidence on the part of the plaintiff.

2. The court erred in refusing to grant defendant's request to instruct the jury to find the defendant not guilty on the ground of variance.

3. The court erred in refusing to grant defendant's request to instruct the jury to find the defendant not guilty.

4. The court erred in refusing to give to the jury proper instructions requested by the defendant; namely, requests numbered 1, 12, 14, and 15 of defendant.

395 5. Misconduct on the part of the attorneys for the plaintiff whereby the defendant was denied a fair trial.

6. The damages are excessive, showing partiality and prejudice on the part of the jury.

7. The verdict is against the law and the evidence in the case.

* * * * * * * * * * * * *

396 JUDGMENT ORDER.

(Bill of Exceptions.)

But the court thereafter at the same term denied said motion for new trial, on condition that the plaintiff remit $4,000 of said verdict and reduce the same to $14,000, and to the denial of said motion the defendant then and there excepted. And thereupon plaintiff remitted the sum of $4,000 from said verdict.

Whereupon, the defendant moved in arrest of

judgment, but the said motion was denied and the defendant excepted.

Thereupon, the plaintiff, having remitted $4,000 of said verdict, judgment was ordered entered by the court for the sum of $14,000, and the defendant excepted.

* * * * * * * * * * * * *

401 Assignment of Errors in Appellate Court.

1. The said Superior Court of Cook County erred in overruling and denying the motion of the said appellant, defendant therein, for a new trial on the grounds specified in said motion, and each and every thereof.

2. The said Superior Court erred in overruling and denying the motion of the said appellant, defendant therein, for a new trial upon condition that the said plaintiff remit four thousand dollars of said verdict.

402 3. The said Superior Court erred in not granting said appellant's motion for a new trial.

4. The said Superior Court erred in entering judgment upon the verdict herein after the remission of four thousand dollars.

5. The said Superior Court erred in entering judgment herein for the sum of fourteen thousand dollars.

6. The said verdict is contrary to the evidence.

7. The said judgment is contrary to law.

8. The said damages of fourteen thousand dollars after remitting four thousand dollars are excessive.

9. The said Superior Court erred in overruling

and denying the motion of the said appellant, defendant therein, in arrest of judgment.

Wherefore, on account of the errors aforesaid, the said appellant prays that the said judgment of the said Superior Court may be reversed.

Dated October 3, 1910.

SHOPE, ZANE, BUSBY & WEBER,
Attorneys for said Appellant, Wabash Railroad Campany.

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Appellate Court Record Page.

AT A TERM OF THE APPELLATE COURT, Begun and held at Chicago, on Tuesday, the fourth day of March, in the year of our Lord one thousand nine hundred and thirteen, within and for the First District of the State of Illinois:

Present, The Honorable BEN. M. SMITH, Presiding Justice.

Present, The Honorable FRANK BAKER, Justice.

Present, The Honorable EDWARD O. BROWN, Justice.

ALFRED R. PORTER, *Clerk*. MICHAEL ZIMMER, *Sheriff*.

John R. Hayes, Appellee, *vs.* No. 16968. Wabash Railroad Company, a Corporation, Appellant.	Monday, May 26th, A. D. 1913. Appeal from Cook Superior.

On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious, or defective, and that in that record there is no error: Therefore, it is considered by the court that the judgment aforesaid, be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and

things therein assigned for error. And it is further considered by the court that the said appellee recover of and from the said appellant, his costs, by him in this behalf expended, to be taxed and that he have execution therefor.

ASSIGNMENT OF ERRORS IN THE SUPREME COURT OF THE UNITED STATES.

Now comes the Wabash Railroad Company, petitioner, for a writ of error to the Appellate Court of the First District of Illinois and says that the said Appellate Court of the First District of Illinois, in rendering its decision and judgment in the cause therein, wherein said Wabash Railroad Company was appellant and said John R. Hayes was appellee, erred in the following particulars, to-wit:

1. The said Appellate Court of the First District of Illinois erred in making and rendering its judgment affirming the judgment of the said Superior Court of Cook County in said cause.

2. The said Appellate Court of the First District of Illinois erred in not making and rendering its judgment reversing the said judgment of the Superior Court of Cook County in Illinois.

3. The said Appellate Court of the First District of Illinois erred in not making and rendering its judgment reversing the said judgment of the said Superior Court of Cook County on the ground that under the declaration in the said cause in the said Superior Court of Cook County and under the proof offered on the trial of said cause, the said plaintiff in said cause could not recover against the said defendant for a cause of action set up under the said

statute of the United States, to-wit: The statute in force April 22, 1908; Chapter 149, 35 Statutes at Large, 65.

And on account of the errors aforesaid the plaintiff in error above named humbly prays this Honorable court that the said judgment of the said Appellate Court of the First District of Illinois, and the said judgment of the said Superior Court of Cook County of Illinois may be reversed, and said plaintiff in error granted such relief as the law in its behalf requires.

L. MINNIS,
JOHN M. ZANE and
CHARLES F. MORSE,
Attorneys for Plaintiff in Error.

OPINION OF THE APPELLATE COURT.

(180 Ill. App., 511.)

Statement of Facts.

This is an appeal from a judgment of the Superior Court of Cook County for $14,000 rendered May 28, 1910, against the appellant, the Wabash Railroad Company, in a suit brought against it by the appellee, John R. Hayes. For convenience we shall in this statement and in the opinion following uniformly designate Hayes as plaintiff and the Railroad Company as defendant.

The judgment was rendered on the verdict of a jury, which verdict, however, was for $18,000. When a motion for a new trial came on to be heard by the court below the plaintiff remitted four thousand dollars and thereupon the record shows that after argument, etc., and "in consideration of said remittitur," the motion for a new trial was denied. A motion in arrest of judgment was also overruled and the judgment in question entered.

A synopsis of the pleadings will show the nature of the case resulting in this judgment.

The first count of the declaration alleges the defendant to be the owner and operator of a railroad from Chicago into different states and a common carrier thereby of commerce between several states; that it had a track extending into and ending in a butting post inside a grain elevator in Chicago; that the plaintiff was employed as switchman in the defendant's handling of commerce, "to assist as its

servant in the work of putting said cars into and taking them out of said elevator, and that it was the duty of the defendant to exercise due care to maintain said track in a reasonably safe condition for the purposes for which it was used."

The count then proceeds to allege that the defendant violated said duty by permitting ties of said track to be broken, rotten and decayed and the track to be uneven and dilapidated, in consequence of which cars run upon and over said track were likely to become uncoupled, endangering the plaintiff and other servants of the defendant; that on July 9, 1908, the defendant, while engaged in interstate commerce and in said commerce had six cars coupled together and to one of its switch engines, and by means of said engine was shoving said cars along the track and into the elevator, that the plaintiff while employed in such commerce and exercising ordinary care, was riding between two of the forward cars of this string of cars; that as the result of the condition of said track two other cars of the string between the plaintiff and the engine became uncoupled from each other and thereby all cars forward of the uncoupling point, including those between which the plaintiff was riding, were detached from the power of the engine and could not be controlled or stopped by said engine, and ran into the elevator and against the butting post at great speed and were wrecked.

The further allegation is: That when the plaintiff learned the cars had become uncoupled they were closely approaching said butting post, "and he * * * believed and was justified in believing that said cars would run against said butting post with great force,

* * * and that if he remained between said cars until they struck said butting post he was * * * likely to be severely injured or killed, and in order to avoid such injuries or death, he thereby then and there attempted to get from between said cars and while he was doing so and while, as he alleges, he was in all respects exercising ordinary care for his own safety, he was * * * knocked down and from between said cars by an obstruction alongside of said track," and that one of the cars ran over the plaintiff's arm injuring it so as to require amputation.

The second count adds to the allegations of the first count the averment that the defendant unlawfully and negligently was using cars coupled by draw bars not complying with the standard required by the Federal Safety Appliance Act and the action of the Inter State Commerce Commission thereunder, and that this unlawful action, together with the unsafe and improper condition of the track, caused the cars to become uncoupled, with the results as detailed in the first count.

The third count makes no reference to the use of improper draw bars, but adds to the allegations of the first count one that "the defendant's engineer, by means of the engine, pushed and ran said cars upon and along said track at an unusually high and dangerous rate of speed," and that the uncoupling of the cars and the subsequent injuries to the plaintiff were the direct result thereof and of the unsafe and improper condition of the track.

The fourth count alleges the same matters as the first count, and in addition that the brake appliances with which one of the cars was equipped for the pur-

pose of setting the brake and stopping the car was in such a defective and inoperative condition that the brake could not be set; that the defendant knew or should have known of this, but that the plaintiff did not learn of it in time to avoid the injuries complained of; that while he was riding on top of one of the forward cars of the string of cars as they were being run towards the elevator, he attempted to set the brake on the car with the defective brake appliances in order to check and stop said car, but was unable to do so on account of said defective condition of the brakes, and as the car on which he was riding was closely approaching the door of the elevator, he climbed down between two of the forward cars of said string of cars in order to avoid being struck by the door; that while so riding between said cars and after the cars had entered the elevator and were closely approaching the butting post, "he learned that the forward cars of said train had accidently become uncoupled from said engine, and then knew that as the brake was not set upon said car upon which he had attempted to set it," they were likely to run against the butting post at a high rate of speed, and he be injured or killed, wherefore, he attempted to get from between said cars and was struck by an obstruction alongside of said track and knocked down onto the track and run over, with the result of a loss of his arm.

The defendant pleaded the general issue of not guilty to this declaration.

MR. JUSTICE BROWN DELIVERED THE OPINION OF THE COURT.

This cause has been argued in the briefs and printed arguments of the respective parties very thoroughly and elaborately, with much analysis of the evidence and with a great wealth of cited authorities upon various points which it is contended are properly involved in its decision.

We have given it on our part a prolonged and very careful consideration. But the conclusions which we have reached do not require for their expression or discussion an opinion proportionate in extent.

In view of the contention of the plaintiff that the court below made an error by which, however, the defendant should not profit, in instructing the jury, at the defendant's request, that the evidence was "insufficient to show that the train of cars or any of them upon which the plaintiff was working at the time of his injury was engaged in interstate traffic," thus withdrawing from the jury the alleged effect of the Federal Safety Appliance Act and the Federal Employers' Liability Act, and leaving them to consider in full effect under the law of Illinois the defenses of contributory negligence and assumed risk, —we have examined at length the arguments and authorities of the respective counsel on this matter. But a discussion of it herein, or even an expression of our conclusions thereon, does not seem to us necessary or even desirable; for we have determined that the pleadings and the evidence made a proper case for the jury to pass on, and justified their verdict, even under the theory which was taken by the trial judge and embodied in his instructions. Under those

instructions it inhered in the verdict of the jury that they found the plaintiff not guilty of contributory negligence but in the exercise of ordinary care, and that they found that he had not assumed the risk of the injury. These conclusions we think they were justified in reaching. Therefore we express no opinion on whether the cars on which plaintiff was working were engaged in interstate commerce.

The defendant maintains, however, that inasmuch as the plaintiff's declaration purports to state in all its counts a cause of action under the Federal Employers' Liability Act, and in one also a cause of action under the Federal Safety Appliance Act, this eliminates the possibility in a legal and technical sense of its stating a cause of action under the common law of Illinois.

The contention was originally made by the defendant that by the statement of this cause of action under the Federal Statutes the jurisdiction of the State Courts of Illinois was ousted; and that the matter became one of Federal cognizance solely. This contention, in view of the decision of the Supreme Court of the United States in *Mondou* v. *New York, New Haven and Hartford Railroad Company*, 223 U. S., 1, the defendant has abandoned, but still insists that although the Superior Court of Cook County had jurisdiction of the case at bar, it was bound, on holding as it did that the participation of the cars in question in interstate commerce was not proven, to have instructed the jury that no cause of action as stated in the declaration had been proven and that they should therefore return a verdict for the defendant. To sustain this point counsel have cited various opinions

of District Judges of the United States holding Circuit Courts, in cases in which they have decided either that the Federal Statutes involved have superseded State Statutes regulating the liablility for personal injuries of railroads engaged in interstate commerce, inconsistent therewith, or have held that in the Federal Courts and as affecting the question whether a suit may be brought in a district in which the plaintiff resides and the defendant does not,—a suit in which the declaration states a case under these statutes can not be held to rest "*only*" on diverse citizenship. (See for example, *Whittaker* v. *Illinois Central R. R. Co.*, 176 Fed. Rep., 130.)

We cannot agree with the defendant's counsel as to the controlling force in this case of these decisions. So far as expressions in the opinion cited and quoted may seem to give color to the contention that the mere statement in a declaration that the plaintiff was injured while engaged in interstate commerce must serve to render nugatory in a State Court the allegations which, without this one, show a complete cause of action under the common law of the state, they are and must from the nature of things be merely *obiter dicta* as applied to the case at bar. Rightly interpreted, however, we think there is nothing in the opinions signifying an intention so to hold. At all events, we think such a holding contrary to sound logic and inconsistent with the well considered reasoning of many opinions in various jurisdictions that remedies given by statute for personal injuries may be cumulative and not in abrogation of a right of action at common law.

Kleps v. *Bristol Manfg. Co.*, 189 N. Y., 516; as reported in 12 Lawyers Reports Annotated, p. 1038; and the cases cited in the note thereon; *Payne* v. *N. Y., Susquehanna & Western Railroad Company*, 201 N. Y., 436.

We hold that the allegations in the first, second and fourth counts of the declaration, that the defendant was engaged and the plaintiff employed in interstate commerce were not descriptive of any fact or condition essential to recovery under the common law, if the other allegations of those counts were sustained, and that therefore they may be regarded as surplusage.

The Chicago & Grand Trunk Ry. Co. v. *Spurney*, 197 Ill., 471.

Treating as surplusage the allegations relating to interstate commerce in the first count of the declaration, to which count we purpose to confine our discussion, we find this cause of action stated—that the defendant was the operator of a railroad, of which a part was a track extending into an elevator and ending at a butting post therein; that the plaintiff was employed as a switchman in putting cars into said elevator; that it was the duty of the defendant to exercise due care in maintaining said track in a reasonably safe condition for the purpose for which it was provided; that in violation of said duty it permitted the said track to remain unsafe and in an improper condition of repair for such use, in that certain ties in said track were broken, rotten and decayed and said track was uneven and in a dilapidated condition, in consequence of which, to the knowledge or legally

imputed knowledge of the defendant, but through no lack of ordinary care of the plaintiff, unknown to him, the cars running on said track were likely to become uncoupled and the plaintiff exposed to great danger; that the plaintiff, while in the discharge of his duty and in the exercise of ordinary care, and while assisting in the work of shoving by a switch engine six cars coupled together and to the switch engine along said track and into the elevator, was riding between two of the cars of said string of cars as they were being so pushed along into said elevator; that as a direct result of the unsafe and improper condition of said track, two other cars of said string of cars, which other cars were between the plaintiff and said engine, became uncoupled from each other, and in consequence the cars between which the plaintiff was riding were detached from the engine and from the cars which remained coupled to the engine, and could not be controlled or stopped by said engine, as they would have been if this uncoupling had not occurred; that as a direct result of this, the said two cars between which the plaintiff was riding unavoidably ran along said track into said elevator at a high rate of speed, and were wrecked by striking said butting post; that when the plaintiff learned that the said cars had become uncoupled they were closely approaching said butting post, and he believed and was justified in believing that if he remained between said cars until they struck the post he would be severely injured or killed, and therefore, in the exercise of ordinary care for his own safety, he attempted to get from between said cars and in so doing was knocked down and from between said cars

by an obstruction alongside of said track, was run over by the cars and lost thereby his arm.

We think this is a sufficient statement of a cause of action arising from the neglect of the defendant to take care that its track should be in reasonably safe condition, and that the connection between that negligence and the injury of the plaintiff is clearly alleged and shows the one to have been the proximate cause of the other. It is true that it is stated that there were intermediate or concurrent matters involved in the accident. There are generally such things between the "*causa causans*" and the ultimate result. But in this count it is stated with sufficient clearness for any one to understand, that the track was negligently left dilapidated; that because of that the cars uncoupled; that because of the uncoupling they rolled with great speed and without control into the elevator; that solely from this the plaintiff was in reason obliged to look for means of escape from a position in which he was placed in the course of his duty and in so doing was injured. The causal connection between the first and last of these propositions, namely, that the track was negligently left dilapidated and that plaintiff was injured, seems to us direct, notwithstanding the intermediate steps.

Defendant maintains, however, that whether or not stated, no sufficient causal connection was proved, to warrant the jury in finding the negligence of the defendant in regard to its track the proximate cause of the plaintiff's injury. It contends that the plaintiff is not shown to have been necessarily or properly between the cars and therefore in a position which required his attempt to escape the impend-

ing crash by jumping or looking for a place to jump near the pillar or "obstruction," as the declaration terms it, by which he was struck and thrown to the tracks inside of the elevator. Therefore, it is said, not even the uncoupling of the cars and the consequent speed with which they were rushing uncontrolled to the butting post, can be considered proximate causes of the injury. That proximate cause rather was the plaintiff's own acts in taking or remaining in the position between the cars, or, at the worst that can be said of the defendant, in its having the pillars in its elevator too near the track, no complaint of which is made.

With this contention there can, for practical purposes, be connected another position taken by the defendant, that the plaintiff, by riding between the cars into the elevator, and by projecting his body sufficiently from the train to be hit by the pillar, or by attempting to jump with the same result, was guilty of negligence proximately contributing to the injury, which of course, if the common law governs, prevents his recovery.

It would not be useful for us to discuss in detail, as counsel have done, the evidence which bears on these contentions of the defendant. We have carefully and patiently considered it all in the light of the elaborate opposing arguments on it. It seems to us on the whole that fair questions for the jury were whether the plaintiff was not where he was when the couplings parted, in the discharge of his duty as usually and properly performed, and in the exercise of due care; whether, considering all things, he was not placed by that parting, by his inability to set the

brake (even if that arose from no defect in the brake itself, and by the increasing speed of the cars which had been freed from the drag which the forward car and the engine, with the power shut off, usually made at that point,—in a position of imminent danger which allowed him no time and imposed on him no obligation to balance chances and attempt one method of escape instead of another, even if subsequent events showed that it would have been less dangerous; in short, whether his conduct was not, up to the time of the injury, free from any taint of blameworthy negligence.

It inhered in the verdict of the jury, we think, under the instructions of the court, that they found it was, and we are not inclined even to disagree with their conclusion, much less to overrule it.

Defendant, however, still further maintains that the evidence does not show that the uncoupling resulted from the condition of the track. It might, it is argued, have resulted from other causes. We think this also was an issue for the jury to decide, and even more strongly than in relation to the previous questions indicated, we incline to the opinion that their decision of it was correct. The evidence is convincing that the couplers on the two cars that parted were closed and locked when they were examined immediately after the accident, and that they were without defect or in any condition which could explain their parting and remaining so closed, unless there had been a drop of several inches by one of the cars from the level of the other. The weight of the evidence also seems to us to show not only that the couplers were closed and locked when exam-

ined, but also that they had remained so during the parting. The hypothesis that they or either of them could have been opened when the parting occurred, but closed afterwards by the jar of collision with the post, furnished ground undoubtedly for argument to the jury, but there was evidence inconsistent with it, and this evidence seems to us to negative it. So the jury evidently considered. If they held that the evidence was sufficient to show that one of the cars which parted sank below the other, so that the couplers parted perpendicularly and one overrode the other, they were also amply justified in finding that a "low joint" in the rails of the track at the point very near which at least the uncoupling occurred, where the track had been pieced or spliced with a short rail about four feet long, which "went up and down" under the weight of one man and rested on a tie so rotten that the piece of it oustide the rail could be kicked off with the foot, was the direct cause of the uncoupling.

As to its being negligence in the defendant to allow such a condition to exist in a track over which men were shoving cars, and where there was a grade which rendered it certain that the cars would run with an increasing accelerated speed if an uncoupling took place, there can hardly be two opinions. It is by no means necessary to hold that the tracks in this switch yard should be kept in the condition required on the main line, to reach the conclusion that reasonable care had not been taken by the defendant to keep its tracks in a reasonably safe condition.

It is contended very vigorously that the plaintiff must be held to have assumed the risk of this condi-

tion of the track. We do not think so. It was a question for the jury, and it was decided by them in our opinion, correctly. The defendant owed the duty of inspection and investigation of the condition; the plaintiff was held only to observation. He might well have known that the joint was "low" and the track rough, so that cars "swayed" in passing over it, and yet not have known the depth to which the weight of a loaded car would depress the rail, nor appreciated the danger resulting therefrom. If he did not so understand and appreciate the danger, he did not assume the risk. The evidence strongly tends to this conclusion.

The final contentions of the defendant are that incompetent evidence was admitted; that two instructions tendered by the defendant, which should have been given, were refused, and that a new trial should have been granted because the amount of the damages assessed by the jury showed passion and prejudice, and even after the remittitur of four thousand dollars is excessive.

We do not hold that there is reversible error to be found in any of these matters.

The first evidence complained of is that the switchmen were accustomed to ride between the cars as the cars were pushed into the elevator. This was properly admitted both as bearing on the question of the alleged contributory negligence of the plaintiff and because the defendant's counsel had indicated that he was intending to prove or attempt to prove that orders had been given that such a position should not be taken by the men. He failed to adduce any evidence of such an order, but he afterward tendered

and obtained an instruction based on the assumption that the jury might believe that such an order had been given.

The other evidence which is alleged to be incompetent is the statement made on cross examination by the defendant's track foreman, that new ties were put under this track a week or so after the accident. There was no error in this, we think. On direct examination the witness had testified that the ties were not bad enough to take out at the time of the accident. We think cross examination was proper to show that they were rotten a week afterward and that he did then take them out.

We do not think the refusal of tendered instructions 14 and 15 was error. The jury were correctly and sufficiently instructed as to contributory negligence, and in our opinion to have called attention to the specific acts which these instructions particularize and segregate would have been misleading. All the circumstances and actions of the plaintiff, taken together with the imminence and anticipation of danger or the want of it, had properly to be considered in judging of his exercise or want of ordinary care.

The damages are large, but the amount of earning power of an arm as compared with that of the money damages assessed for its loss is not now, if it ever was, the sole test which can be applied to ascertain if the damages are excessive; and we do not feel that we should interfere with the judgment of the jury in this case under the practice now established in case of such injuries.

The judgment of the Superior Court is affirmed.

AFFIRMED.